

2. It is admitted that the plaintiff was in the employment of the defendant as a flagman. The remaining allegations of paragraph 2 are denied.

3. It is denied that on July 2, 1952, at or about the hour of 11:05 a.m., while engaged in the course and scope of his employment on defendant's house track in or near Mount Olive, Illinois, plaintiff observed a car in one of defendant's trains which was leaking grain. It is further denied that it became and was the duty of the plaintiff to plug a hole in the bottom of a car from which it is alleged the wheat was leaking.

4. It is denied that at the time and place alleged defendant's house track ran in a general north and south direction, and it is further denied that the cars which contained the car which was allegedly leaking wheat included a caboose. It is further denied that as plaintiff walked south on the east side of the house track for the purpose of getting some waste material from the caboose to use in plugging up the alleged leak in the wheat car he stepped upon a large clinker which was imbedded in loose cinders and he was caused to lose his footing and to fall and injure his left knee.

5. It is denied that prior to the happening of the alleged occurrence defendant, through its agents and servants, had made repairs in the roadbed and ground adjacent thereto. It is further and specifically denied that defendant, through its agents, carelessly and negligently placed said large clinker among loose cinders, or carelessly and negligently allowed and permitted said large clinker to remain in said cinders.

6. It is denied that at the time and place alleged the defendant was guilty of any of the acts of negligence or unlawful conduct alleged as directly and proximately causing, or directly and proximately contributing to cause, the alleged accident and plaintiff's injuries. It is further and specifically denied that the defendant:

(a) Failed to use ordinary care to furnish the plaintiff with a reasonably safe place to work and to perform the duties of his employment.

(b) Placed a large clinker among the cinders constituting its roadbed and thereby created a hazardous condition for its employees working upon or about its aforementioned tracks.

(c) In repairing or reconstructing its aforementioned roadbed failed to inspect the materials used for said purpose and carelessly and negligently allowed and permitted a large clinker to be placed among loose cinders adjacent to the aforementioned tracks.

(d) It was otherwise careless and negligent in the premises and violated its established rules, customs and practices.

11. 7. The allegations of paragraph 7 are denied.

8. The allegations of paragraph 8 are denied.

9. The allegations of paragraph 9 are denied.

10. For a further, separate and complete defense, defendant alleges that the injuries complained of resulted solely from plaintiff's negligence in that at the time and place alleged said plaintiff failed to exercise due care and caution for his own safety, which failure proximately caused or proximately contributed to cause his own injuries.

WHEREFORE, plaintiff is not entitled to judgment against the defendant in the amount of \$30,000 plus costs and disbursements, or in any amount whatsoever, by reason of the allegations of the complaint as they are therein set forth.

ILLINOIS CENTRAL RAILROAD COMPANY.

By Herbert J. Deany,

Charles L. Hopkins, Jr.,

Its Attorneys.

135 East Eleventh Place

Chicago 5, Illinois

WAbash 2-4811

12 And afterwards on, to wit, the 11th day of April, 1955 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had On February 18, 21 and 23, 1955, Before The Honorable Philip L. Sullivan, Judge, in words and figures following, to wit:

17

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption No. 53 C 1687) • •

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the Judges of said Court, and a jury, at Chicago, Illinois, commencing on February 18, 1955.

Appearances:

Mr. Robert J. Rafferty,
Appeared on behalf of the Plaintiff;
Mr. William F. Bunn,
Appeared on behalf of the Defendant.

18 (A jury was duly empaneled and sworn to try the cause. Jury voir dire not transcribed.)

(Thereupon the Jury heard the opening statements of counsel for the respective parties. Opening statements not transcribed.)

Thereupon the plaintiff, to maintain the issues on his part, offered and introduced the following evidence:

19

STIPULATION

Mr. Rafferty: We have stipuated and agreed that at the time and place of the accident in question both the plaintiff and the defendant were engaged in interstate commerce in transportation.

20 JOHN WEBB, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Court: Your name is John Webb?

The Witness: Yes, sir.

The Court: Where do you live?

The Witness: Clinton, Illinois?

The Court: Clinton?

The Witness: Yes.

The Court: What do you do?

The Witness: Railroader.

The Court: You are the plaintiff in the case, are you?

The Witness: Yes.

The Court: All right.

Direct Examination by Mr. Rafferty.

Q. Mr. Webb, how old a man are you?

A. 48.

Q. Will you speak up loud enough so these folks way back at the end of the jury box can hear you?

A. Yes.

Q. Maybe if I sit back here you will talk louder. By whom are you employed, Mr. Webb?

A. Illinois Central Railroad.

21 Q. When did you first hire out to the Illinois Central Railroad?

A. In 1925.

Q. What type of job did you take on at that time?

A. I worked on the section.

Q. How long did you work as a section hand?

A. Up until 1927. I was laid off on account of reduction in force. Then I was taken back in 1928 and transferred from there to the paint gang.

Q. You were taken back in 1928 on the section gang?

A. Yes.

Q. And do you recall how long you worked on the section gang until you transferred to the painting division?

A. No, I don't.

Q. What were your duties as a section hand in your employment by the Illinois Central Railroad?

A. Well, we repaired track, laid track, put in new ties and new ballast.

Q. I believe about the year 1928 or 1929 you stated you were transferred to another department?

A. I went to the bridge and building department.

Q. How long did you stay in the bridge and building department?

A. Up until 1935.

22 Q. And in the year 1935, then what, if anything, did you do?

A. I hired out as a brakeman.

Q. Was that also with the Illinois Central?

A. Yes, sir.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11462

JOHN W. WEBB,

Plaintiff-Appellee,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant-Appellant.

**Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.**

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WITNESSES.

For the Plaintiff:

Webb, John—

Direct 9

Recalled:

Direct 35

Cross 44

Redirect 65

Stotz, Dr. S. Kenneth—

Direct 18

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For the Defendant:

Rector, Lester—

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Statement Pursuant to Rule 10(b)

**IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division**

1 • • (Caption—Civil Action No. 53 C 1687) • •

**Statement Pursuant to Rule 10(b) of
United States Court of Appeals
Seventh Circuit**

Action commenced: July 31, 1953.

Parties: John W. Webb, Plaintiff; Illinois
Central Railroad Company, Defendant.

Pleadings: Complaint filed July 31, 1953; Answer
filed August 26, 1953; Defendant's motion
for judgment or in the alternative
for a new trial filed March 4, 1955;
Defendant's motion for judgment and
motion for new trial denied March 14,
1955.

Trial: Jury, before Honorable Phillip L.
Sullivan; cause called to trial February
17, 1955 and continued to February
18, 1955; evidence heard on
February 18 and 21, 1955, and concluded
on February 23, 1955; verdict
for plaintiff and damages in the sum
of \$15,000 rendered February 23,
1955.

Judgment: Judgment on the verdict in the sum
of \$15,000 entered February 23, 1955.

Appeal: Taken by filing Notice of Appeal
April 7, 1955.

2 **PLEAS** had at a regular term of the United States
District Court for the Eastern Division of the Northern
District of Illinois begun and held in the United States

Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of February (it being the 7th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 179th Year.

Present: Honorable John P. Barnes, District Judge
 Honorable William H. Holly, District Judge
 Honorable Philip L. Sullivan, District Judge
 Honorable Michael L. Igoe, District Judge
 Honorable William J. Campbell, District Judge
 Honorable Walter J. La Buy, District Judge
 Honorable J. Sam Perry, District Judge
 Honorable Win G. Knoch, District Judge
 Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Wednesday, February 23, 1955

Court met pursuant to adjournment

Present: Honorable Philip L. Sullivan, Trial Judge

3 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of March (it being the 7th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 179th Year.

Present: Honorable John P. Barnes, District Judge
 Honorable William H. Holly, District Judge
 Honorable Philip L. Sullivan, District Judge
 Honorable Michael L. Igoe, District Judge
 Honorable William J. Campbell, District Judge
 Honorable Walter J. La Buy, District Judge
 Honorable J. Sam Perry, District Judge
 Honorable Win G. Knoch, District Judge
 Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Monday, March 14, 1955

Court met pursuant to adjournment

Present: Honorable Philip L. Sullivan, Trial Judge

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

4 • • (Caption—Civil Action No. 53 C 1687) • •

BE IT REMEMBERED, that on to wit, the 31st day of July, 1953, the above-entitled action was commenced by the filing of the Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—Civil Action No. 53 C 1687) • •

JURY DEMANDED

COMPLAINT

5 Now comes the plaintiff, John W. Webb, by Robert J. Rafferty, one of his attorneys, and for his cause of action against the defendant the Illinois Central Railroad Company, alleges and states:

1. Defendant is, and at all times herein mentioned, was a corporation duly organized and existing according to law, engaged and engaging in the business of owning and operating a line and system of railroads and railroad properties as a common carrier by railroad of goods and passengers for hire in interstate commerce and transportation in, through and between various of the several states of the United States, and doing business and having an office and principal place of business in the City of Chicago, County of Cook and State of Illinois.

2. Plaintiff, at all times herein mentioned and for some time prior thereto, was in the employment of the defendant as a flagman and employed by the defendant in its business of interstate commerce and transportation by railroad, and all or a substantial part of the duties of the plaintiff in such employment were in furtherance of interstate commerce and transportation, and directly, closely and substantially affected such commerce; that

6 plaintiff duties as such a flagman required him to work on or about the cars, tracks and premises of the defendant, and to do other work generally performed by a flagman.

Complaint.

3. That on to-wit July 2, 1952, at or about the hour of 11:05 a.m., while engaged in the course and scope of his employment on defendant's house track in or near Mount Olive, Illinois, plaintiff observed a car in one of defendant's train which was leaking grain, and it became and was the duty of the plaintiff to plug a hole in the bottom of a car from which said wheat was leaking.

4. That at said time and place defendant's house track ran in a general north and south direction and the cut of cars which contained the car leaking wheat as aforesaid included a caboose; that as plaintiff walked south on the east side of the aforementioned house track for the purpose of getting some waste material from the caboose to use in plugging up the leak in the aforementioned wheat car he stepped upon a large clinker which was imbedded in loose cinders and he was caused to lose his footing and to fall and injure his left knee.

5. That prior to the happening of the occurrence herein complained of, defendant, through its agents and servants, had made repairs in the roadbed and ground adjacent thereto and carelessly and negligently placed said large clinker among loose cinders, or carelessly and negligently allowed and permitted said large clinker to remain in said cinders.

6. That at said time and place the defendant was guilty of one or more of the following acts of negligence or unlawful conduct which directly and proximately caused, or directly and proximately contributed to cause, the accident in question and the plaintiff's injuries:

(a) Failed to use ordinary care to furnish the plaintiff with a reasonable safe place to work and to perform the duties of his employment.

(b) Placed a large clinker among the cinders constituting its roadbed and thereby created a hazardous condition for its employees working upon or about its aforementioned tracks.

(c) In repairing or reconstructing its aforementioned roadbed failed to inspect the materials used for said purpose and carelessly and negligently allowed and permitted a large clinker to be placed among loose cinders adjacent to the aforementioned tracks.

(d) It was otherwise careless and negligent in the premises and violated its established rules, customs and practices.

7. As a direct and proximate result of one or more of the foregoing acts of negligence and unlawful conduct, plaintiff was permanently and severely injured in the region of his left knee and was caused to suffer great bodily and mental pain; he was subsequently hospitalized and operated upon.

8. Prior to receiving said injuries plaintiff was in good health and was regularly employed by the defendant and was earning and was capable of earning large sums of money in the work in which he was engaged for the defendant; that as a result of the foregoing accident and injuries he has been permanently injured and he has lost large sums of money which he would otherwise have made and obtained and his earning capacity has been damaged and impaired.

9. THAT by reason of the facts herein alleged plaintiff has sustained damages at the hands of the defendant in the sum of Thirty Thousand (\$30,000.00) Dollars.

10. WHEREFORE: Plaintiff demands judgment against the defendant in the amount of Thirty Thousand (\$30,000.00) Dollars plus his costs and disbursements incurred herein and he demands trial by jury.

Robert J. Rafferty,
Attorney for Plaintiff.

30 N. LaSalle Street
Chicago 2, Illinois
RAndolph 6-1892

8 And afterwards on, to wit, the 26th day of August, 1953 came the defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—Civil Action No. 53 C 1687) • •

9 **ANSWER**

Now comes the defendant, ILLINOIS CENTRAL RAILROAD COMPANY, by its attorneys, and for answer to the complaint filed herein says:

1. The allegations of paragraph 1 are admitted.

Q. And did you work in any other line of work during any of this period of time from 1925 down to date except as a railroad man in the employment of the Illinois Central?

A. I do not understand.

Q. Did you ever do any other work during this period from 1925 down to date except work for the railroad?

A. Yes. When I was cut off on account of reduction in force, I worked on the farm.

Q. Now, Mr. Webb, what are the duties of a brakeman in the employ of the Illinois Central Railroad; what does your job require you to do?

A. Well, I set off and pick up cars at different stations, inspect the train for bad order cars en route between points, and throw switches, derails, couple and uncouple cars, and various other duties.

Q. Do your duties as brakeman require you to get on and off moving cars?

A. Yes.

23 Q. And do they also require you to go over the tops of moving cars?

A. At various times, yes.

Q. Did your duties as brakeman also require you to walk over and alongside the roadbed under all types of weather conditions and over all types of roadbed?

A. Yes, sir.

Q. Directing your attention, Mr. Webb, to the 2nd day of July, 1952, do you recall where you reported for work that day?

A. East St. Louis, Illinois.

Q. And how are the work designations made; do they assign you a train or number of a run, or what?

A. Yes, sir.

Q. Do you remember the run number?

A. No. 68.

Q. What was the destination of train No. 68 that day?

A. Clinton, Illinois.

Q. Do you recall who the members of the engine crew were that were assigned to that train?

A. Yes.

Q. Who were they?

A. Forrest Carlson was the engineer, and Elza Isaacs was fireman.

- 24 Q. Who were the members of the train crew?
A. Conductor, J. A. Thompson; head brakeman, C. J. Stevenson; and myself as flagman.
Q. And is the flagman also the same as the rear brakeman?
A. Yes.
Q. Now, in railroading, Mr. Webb, is the conductor the foreman or supervisor of the job?
A. Yes, sir.
Q. Do you recall what time your train left East St. Louis that morning?
A. No, I don't. I have no record. I don't keep the record of what time we leave.
Q. Did I ask you before what the destination of the train was?
A. Yes.
Q. Clinton?
A. Clinton.
Q. Did you have occasion that morning to make a stop in the Town of Mt. Olive, Illinois?
A. Yes, sir.
Q. And approximately how far from East St. Louis is that?
A. About 46 miles.
- 25 Q. Do you recall approximately what time your train arrived at Mt. Olive?
A. About 10:45 A.M.
Q. Now, Mr. Webb, in Mt. Olive, is it correct to state that the Illinois Central main line track runs in a generally north and south direction?
A. Yes, sir.
Q. And is there a track to the east of the main line track?
A. Yes, sir.
Q. What is that track known and called?
A. Passing track.
Q. How is the passing track connected with the Illinois Central main line track?
A. By a switch.
The Court: By a switch, you said?
The Witness: Yes.

By Mr. Rafferty:

Q. Then is there a crossover track that leads from track to track?

A. It is what they call a turnout; it is an extension of the passing track.

Q. Mr. Webb, to the south of the passing track, and for all practical purposes almost an extension of it, 26 is there a track known as the house track?

A. Yes, sir.

Q. What other tracks are there to the east of the passing track and the house track?

A. There is the L & N main line track.

Q. Is that track connected with the Illinois Central passing track in some way?

A. Yes, sir.

Q. Is that done by switches and connecting track between the two?

A. Also by crossover.

Q. Mr. Webb, where is the house track switch located?

A. At the extreme south end of the passing track.

Q. And also to the east of the Illinois Central main line track?

A. Yes, sir.

Q. Now, when your train got to Mt. Olive, Illinois, what work was required to be done, as you remember?

A. We had orders to pick up a car from the house track and spot it on the mill track; also pick up two cars from the L & N house track that went with us. I don't know the destination of those cars.

Q. Can you tell us what your duties were in connection with the various picking up and dropping off of the 27 cars? What did you do that day?

A. Well, I threw the switches, coupled and uncoupled the cars, and directed the head brakeman what to do, gave signals to the engineer, seen that the movement was properly and safely made.

Q. Will you tell us the last movement that was made before this accident involved in this lawsuit? What was the last movement the train made or any cars made that you remember?

A. We picked this car up behind the train off of the Illinois Central house track, pulled out of the house track,

and backed the train toward the main line. I cut off behind the first car behind the engine.

Q. Where was the engine located at that time? Was it on the main line track, or the passing track of the crossover track?

A. It was between the crossover, from the passing to the L & N, and the house track switch.

Q. When you stated you cut a car off, did you cut it off next to the engine, or the far end of the car, so it remained attached to the engine?

A. It remained attached to the engine.

Q. Where was the next car located behind the car from which the uncoupling had been made?

28 A. Well, the north end of the car that was left standing was setting about 200 feet south of the house track switch.

Q. Do you know what kind of a car that was?

A. A box car.

Q. Do you know whether it was a load or empty?

A. Loaded.

Q. Do you know what it was loaded with?

A. Wheat.

Q. What, if anything, unusual did you observe about that car?

A. I observed it was leaking grain.

Q. Have you had experience, Mr. Webb, as an employee of the railroad, on previous occasions with noticing cars that were damaged in transit or were leaking?

A. Yes, sir.

Q. What were your duties when you saw that?

A. Well, we always try to rectify the leak, I mean, stop it from leaking, by plugging it with something.

Q. On this particular occasion, what did you do or plan to do when you saw the car leaking grain?

A. Well, when I saw it leaking grain, I told the head brakeman to go ahead with the work, told him what to do, and to plug the car, to stop the leak.

Q. At that time where were you standing?

29 A. I was standing about 20 feet south of the house track switch.

Q. And what did you do at that time? Tell us in your own words how this accident happened.

A. After I had instructed the head brakeman to go ahead with the work, I turned the angle cocks between the two cars, the first two cars in the train, and pulled the pin that would uncouple the head car from the balance of the train, gave the engineer a go-ahead sign. I started to turn to go back to the caboose to get some waste to plug this hole with, when I stepped on a cinder, a clinker, and fell.

Q. Do you recall how many steps you took before you stepped on this cinder or clinker you refer to?

A. One.

Q. And what foot, if you know, came down on it?

A. The left foot.

Q. Had you seen this clinker before you made your step?

A. No, sir, I did not.

Q. Had you had occasion to look at the ground?

A. Yes, sir.

Q. Will you tell us what happened with reference to your body when you stepped on this object?

30 A. My foot turned, threw me off balance, and I fell with my left leg doubled under me.

Q. If you can, Mr. Webb, will you tell the Court and jury whether or not, when you say you were thrown, whether you were thrown toward the left or right or forward or backward? Tell us, if you will, how your weight went.

A. I just went down in a heap.

Q. With reference to your knee, tell us where the force, if any, was exerted.

A. It was right in the knee joint; all my weight was on my left leg.

Q. Did you have occasion then to look at the ground and see what, if anything, had caused you to loose your balance at that point?

A. Yes, sir.

Q. What, if anything, did you observe?

A. I saw this clinker.

Q. Tell the Court and jury, or demonstrate, if you can, the approximate size of this object.

A. It was about the size of my fist, I guess.

Q. Had that clinker been on top of the roadbed before you made this step you refer to?

31 A. I never noticed.

Q. Tell the Court and jury what the condition of the roadbed was with reference to the cinders and construction around there.

A. It was a little bit soft. You could leave your foot-prints in it when you walked.

Q. Where was this cinder then when you saw it?

A. It was laying right by my foot.

Q. Was it imbedded in the ground or out of the ground?

A. It was out of the ground.

Q. Pardon me?

A. It was out of the ground, partially out of the ground.

Q. How did your leg feel at that time, Mr. Webb?

A. Very painful.

Q. Are we talking about your left leg now?

A. Yes, sir.

Q. What did you do?

A. Well, I got up, and looked to see what I stepped on, you know, and picked up and cast it to one side. I went back to the caboose, got a piece of waste off the caboose, and went back and plugged the hole in this wheat car.

Q. Then what did you do, Mr. Webb?

32 A. I got on the caboose and remained there.

Q. And according to your best judgment, approximately about what time of the day was this accident?

A. About 11.05.

The Court: About what time?

The Witness: About 11:05 A. M.

By Mr. Rafferty:

Q. What did you do then after you plugged up the grain car, Mr. Webb?

A. I went back into the caboose.

The Court: You did what?

The Witness: I walked back and got in the caboose.

The Court: All right.

By Mr. Rafferty:

Q. Did you do any more work at Mt. Olive yourself?

A. No, sir.

Q. What was the next stop that train made after Mt. Olive?

A. Litchfield, Illinois.

Q. And approximately how far is Litchfield from Mt. Olive?

A. About 9 miles.

Q. From the standpoint of running time, what 33 would that mean?

A. About 12 to 15 minutes.

Q. During the trip from Mt. Olive to Litchfield, Illinois, were any of the members of the train crew in the caboose with you?

A. The conductor.

Q. Did you report the accident to the conductor?

A. Yes, sir, immediately after it happened.

Q. What, if anything, did you do when you got to Litchfield, Illinois?

A. I went to see the company doctor.

Q. And who was he?

A. Dr. Siler.

The Court: Siler?

The Witness: Yes, sir.

The Court: S-i-l-e-r?

The Witness: Yes.

By Mr. Rafferty:

Q. What, if anything, did Dr. Siler do for you?

A. He examined my knee, is all.

Q. Did he give you any treatment?

A. No, sir.

Q. What did you do then?

A. He instructed me to go on to Clinton and go to 34 the company doctor at Clinton.

Q. And how did you get from Litchfield to Clinton?

A. In the caboose.

Q. And from the standpoint of miles and running time, what was the distance and approximate time it took to get to Clinton?

A. 55 miles was the distance, and the running time varied.

The Court: How long did it take this day?

The Witness: I don't know exactly. We left there, I expect, about 1:00 o'clock at Litchfield, and we arrived in Clinton somewhere around 7:00 o'clock.

By Mr. Rafferty:

Q. There was work done by the crew between Litchfield and Clinton?

A. Yes.

Q. Did you assist or help in that work?

A. No, sir.

Q. Where were you while the work was being done?

A. In the caboose.

Q. When you got to Clinton that evening, what did you do?

A. I got off the caboose and walked to the depot
35 and there I met Trainmaster Brink, and he took me to Dr. Sinow at Clinton.

The Court: Mr. Rafferty, is this witness, the doctor that is coming in, an attending physician?

Mr. Rafferty: No, he is not.

The Court: All right. Go ahead.

By Mr. Rafferty:

Q. During this period of time, Mr. Webb, had you made out any accident report form?

A. Yes, sir.

Q. And is that an official form required by the company?

A. Yes, sir.

Q. Now, when you saw Dr. Sinow that evening, what, if anything, did he do or prescribe for you?

A. He examined my knee, and took two X-rays of it.

Q. What, if anything, did you notice about the appearance of your knee at that time?

A. It was swollen.

Q. How did it feel?

A. Very painful.

Mr. Rafferty: Your Honor, Dr. Stotz is here. May I have permission to withdraw Mr. Webb temporarily?

36 The Court: All right. What doctor was that?

The Witness: At Clinton?

The Court: No, the one you just mentioned.

The Witness: Dr. Sinow.

The Court: He is at Clinton?

The Witness: Yes, sir.

The Court: All right. That is all for the time being.
(Witness temporarily withdrawn from the witness stand.)

37 DR. S. KENNETH STOTZ, called as a witness on behalf of the Plaintiff herein, being first duly sworn, was examined and testified as follows:

The Court: What is your name?

The Witness: Dr. S. Kenneth Stotz.

The Court: Where do you live, Doctor?

The Witness: 3946 North Tripp.

The Court: Where is your office?

The Witness: 20 North Wacker Drive.

The Court: All right.

Direct Examination by Mr. Rafferty:

Q. Doctor, are you licensed to practice as a physician and surgeon in the State of Illinois?

A. I am.

Q. When were you so licensed?

A. 1934.

Q. Of what school or schools are you a graduate?

A. Northwestern University.

Q. In what year, Doctor?

A. 1934.

Q. Where did you take your internship after that period of time?

38 A. Cook County Hospital, and Walther Memorial Hospital.

Q. Doctor, have you had occasion to specialize in any branch of your profession?

A. Yes, sir, I have.

Q. In what branch?

A. Industrial medicine and surgery.

Q. And what does that specialty involve, Doctor?

A. It involves the treatment of injured workmen.

Q. Doctor, at my request have you had occasion to examine the plaintiff in this case, Mr. John W. Webb?

A. Yes, I examined him.

Q. When was the date of your first examination, Doctor?

A. On September 3, 1952. I examined him again on November 11, 1954, and again yesterday.

Q. Also, I believe, on November 12, 1952, Doctor. Have you a copy of your report at that time?

A. September 3, 1952? That is all I have the records. There may be another occasion.

Q. There is one November 12, 1952.

A. November 12, 1952.

Q. Doctor, directing your attention to the 3rd day of September, 1952, will you tell the Court and jury what your objective examination of Mr. Webb disclosed at that time.

39 A. The examination of September 3, 1952, showed considerable atrophy of misuse of the quadriceps groups of muscles.

Q. What do you mean by atrophy, Doctor, and what are the quadriceps muscles?

A. The quadriceps muscles are the group of muscles on the anterior portion of the thigh, having the function of straightening out the knee, some attached to the knee cap.

Q. When you use the word "atrophy," what do you mean by that?

A. Shrinking up of the muscles; they are smaller in size.

Q. What, if anything else, did you objective examination disclose at that time?

A. Measurement of the circumference of the left knee at the patella showed $15\frac{1}{4}$ inches; on the right, $14\frac{1}{4}$ inches.

Q. Is the patella what we lay people know as the knee cap, Doctor?

A. That is right. The measurement means that the knee on the right was larger in circumference than on the left at that time.

Q. By the left, you mean, Doctor?

40 A. The left knee, yes, was larger than the right. At that time he lacked ten degrees of full extension and 20 degree from full flexion when compared to the opposite leg. X-ray at that time was negative.

Q. When you say "negative," Doctor, you mean no evidence of fracture, is that correct?

A. Yes, no evidence of bony pathology.

Q. Tell us if at the conclusion of your examination on September 3, 1952, you made any diagnosis of Mr. Webb's condition?

A. Yes. At that time I thought he had a severe sprain of the knee, with possibly derangement of the medial meniscus; other words, the cartilage on the inside of the knee.

Q. You again saw Mr. Webb at my request, Doctor, November 12, 1952, is that correct?

A. That is correct.

Q. And what did your objective examination of Mr. Webb disclose at that time, Doctor?

A. Examination on November 12th revealed a scar, a surgical scar, located over the medial aspect of the left knee. The scar was about four inches in length. The patient had normal range of flexion and extension of the knee, and the tests for stability were satisfactory.
41 Measurements of the legs at that time were as follows:

Left leg at the calf, 12 inches; right, $13\frac{3}{8}$ inches.

At the patella, that is at the knee itself, left, $15\frac{1}{4}$ inches; right, $14\frac{3}{8}$ inches.

Six inches above the patella or knee cap, left, $17\frac{1}{2}$ inches; right, $18\frac{5}{8}$ inches.

Q. What, if any, significance was there to those measurements, Doctor?

A. That there was atrophy of the calf and thigh, and swelling of the knee.

Q. And this was an examination which had followed an operation, had it not, Doctor?

A. That is correct.

Q. You were not the operating surgeon?

A. That is correct.

Mr. Rafferty: For your information, Doctor, counsel and I have agreed that the cartilage was removed in the operation. Is that correct, Mr. Bunn?

Mr. Bunn: That is right.

By Mr. Rafferty:

Q. Which you probably discovered.

A. That is right.

42 Q. Doctor, what, if any, diagnosis of his condition did you make at that time, and what, if any, recommendation did you make to Mr. Webb?

A. I thought at that time that he did have the cartilage removed, and that he was not sufficiently strong enough to return to heavy work; and I recommended about a month to six weeks more rest and treatment.

Q. Doctor, you have referred to the cartilage that you physicians call the medial meniscus. Tell the Court and

jury where it is located and what function it performs in the human anatomy.

A. In the knee joint there are two cartilages, and they are rather moon-shaped, or semi circular. There is one on the inside of the knee, and one on the outside of the knee. The thigh bone is divided into two parts, and the knee joints sort of rest a trifle on, one side of it rests on one of these cartilages, and the other side rests on the other. The cartilage itself is on the tibia bone, which is the shin bone, and the cartilage function is more or less a bearing, like a bearing in a crank shaft of an automobile. It is slightly resilient; it takes up a little shock; and it also is very smooth in its surface; and the thigh bone lies over these cartilages, normally.

43 Q. Now, Doctor, did you have occasion to see Mr. Webb at a future time at my request?

A. Yes, I did.

The Court: What date is he now talking about?

Mr. Rafferty: It would be on or about the 11th—

The Witness: November 11, 1954, was the next occasion I saw the patient.

By Mr. Rafferty:

Q. What, if anything, did your objective examination on that date disclose?

A. Examination of the left leg on that date showed the same surgical scar, located in the same place. There was crepitation on motion of both knees, palpated, but more pronounced in the left.

Q. What does that mean in plain language?

A. In plain language, sort of a crackling feeling the examiner gets when he touches a joint and he moves it.

Q. What does that mean, Doctor?

A. It usually means an irregularity in the joint. You can have some crepitation without any appreciable disease of the joint. The important thing is: is there more on one side or the other, or are they the same?

Q. Was there more on one side than the other?

A. Yes, there was more in the left.

44 Q. Of what significance was that before the cartilage had been removed in the left leg?

A. It suggests that the joint on the left is not as regular as the one on the opposite side. Pressure on the knee,

stretching the medial collateral ligament, causes the patient to complain of pain.

Mr. Bunn: I object.

The Court: Not what he complained of. That was your objection, I take it?

Mr. Bunn: I object to any discussion as to what pain the patient told him he had.

The Court: Don't testify to anything the patient told you; just what you observed.

By the Witness:

A. A slight, visible swelling, in the area of the pre-patellar bursa.

By Mr. Rafferty:

Q. What is the bursa, Doctor?

A. The bursa is a sac just below the knee cap. Swelling of it sometimes called in layman's terms, housemaid's knee.

Q. What else did your objective examination disclose?

A. We measured the legs again. The right calf was $13\frac{1}{8}$, the left calf, $13\frac{1}{8}$; at the patellar level, the right was $14\frac{1}{4}$, the left, $14\frac{1}{2}$; six inches above the patella, $17\frac{1}{2}$ on the right, and $17\frac{3}{4}$ on the left.

Q. Of what significance was the difference in measurements at that time, Doctor?

A. There wasn't too much difference in the two legs at that time. We might say that might be within the error of test; but when you looked at the patient, you could see a definite visible atrophy in the medial aspect of the thigh.

Q. And is "atrophy" the expression you said before indicated a disuse condition, Doctor?

A. That is correct.

Q. What else did your objective examination disclose at that time?

A. At that time we took x-rays of both knees, and there were no pathological findings with the exception there is slightly less calcium about the bone in the left knee joint when compared to the right.

Q. Of what, if any, significance is that?

A. It is an atrophy condition, similar to the atrophy of the muscles; it is a loss of calcium from disuse.

Q. When was the next time you saw Mr. Webb, Doctor?

A. I saw him yesterday, and on that date the same scar I described before was present; definite visible

46 atrophy of the left thigh most noted in the medial and the anterior aspect. The patient appears to have full range of flexion and extension of the left knee. He walks with a slight limp and somewhat uncertain gait. Measurements of the legs are as follows:

Calf, $13\frac{1}{4}$ on the right; left, 13. She has made an error here in my report. I better take it from my original notes.

At the calf the right was $13\frac{1}{8}$. I want to be sure I have got the right one. I mean, here it is.

On the examination yesterday, left calf, 13; right calf, $13\frac{1}{4}$; at the knee, $14\frac{3}{8}$, left; right, $14\frac{1}{8}$; six inches above the knee, $17\frac{1}{4}$, left; $17\frac{3}{4}$, right.

Q. Of what significance were those measurements, Doctor?

A. That is the same as previously. There is slight atrophy of the calf, a little more in the thigh, and slight swelling in the knee.

Q. And what was your diagnosis at the conclusion, Doctor, of your examination of Mr. Webb yesterday?

A. I felt that the patient had had a cartilage removal, and that there were some residuals from it.

The Court: What do you mean by that?

47 The Witness: There was a residual permanent disability.

By Mr. Rafferty:

Q. Doctor, assume a man 46 years of age; who on or about July 2, 1952, was employed as a railroad brakeman. While engaged in the course of his employment, he had occasion to step on a large clinker or cinder in a soft road bed, and was suddenly thrown from his balance, and felt a pain in his left knee. He was examined by a doctor within approximately half an hour thereafter; was examined by another doctor on the same evening. The second doctor referred to gave this man diathermy treatments to approximately July 17th, during which period of time he got about by the use of crutches. He was admitted to a hospital and given physiotherapy treatments until approximately July 28th. During all this period of time, Doctor, he complained of pain and swelling in his knee, and a feeling of instability of the left knee.

He was released from the hospital and returned to a treating physician, who placed his left knee in a cast for

a period from approximately August 4th to August 25th of the same year; and after the removal of the cast, diathermy treatments were given.

On or about September 13, 1952, an operation was performed wherein the medial meniscus in his left knee was removed. On or about September 18 of the same year, a needle was inserted in the operative area, and fluid removed therefrom.

He returned to the care of the attending doctor, and was given physiotherapy treatment, and weights were attached to his left leg, which he was instructed to raise and lower to strengthen the muscles. He was instructed to use a hot water bottle and an electric pad on his left knee.

He was released for work by the attending physician on or about November 10, 1952.

He was examined on or about September 3, 1952, by a physician, whose objective examination disclosed considerable atrophy of disuse of the quadriceps group of muscles; and measurements made by the attending physician at that time showed that the left knee at the patella measured approximately $15\frac{1}{4}$ inches in circumference, whereas the right knee was approximately $14\frac{1}{4}$ inches; and at that time he lacked about ten degrees of full extension and twenty degrees of full flexion. X-rays were taken and were negative for fractures.

This man returned to work on or about December 10, 1952, and at that time observed a painful condition of his left knee, and found that upon using his leg that it swelled up on him and caused him continuous pain, and at all times he had a feeling of insecurity and instability in the left leg.

He was examined again by a physician on or about November 11, 1954, who observed at that time that an operation had been performed, and a scar three to three and a half inches long was observed in the area of the left patella. At that time there was a slight visible swelling in the area of the pre-patellar bursa. That the measurement at the calf on the left leg was $13\frac{1}{8}$, and the same on the right; but at the patella $14\frac{1}{2}$ on the left and $14\frac{1}{4}$ on the right; and six inches above the knee, $17\frac{3}{4}$ on the right and $17\frac{1}{2}$ on the left. At that time an X-ray film was taken and it was observed that there was less calcium about the bone on the left knee than on the right.

The man was again examined by a physician on or about November 11, 1954, who observed at that time crepitation in both knees when palpated, but more pronounced in the left; and a visible swelling in the area of the pre-patellar bursa.

He was examined again by a physician on or about February 17, 1955, at which time the following measurements were observed: at the calf, on the left, 13 inches, the right, $13\frac{1}{4}$ inches; at the knee, $14\frac{3}{8}$ inches on the left, and $14\frac{1}{8}$ inches on the right; six inches above the knee, $17\frac{1}{4}$ inches on the left and $17\frac{3}{4}$ inches on the right, but that there was definite visible atrophy of the left leg. At that time the individual walked with an uncertain gait and a limp.

Do you have an opinion, Doctor, based upon a reasonable degree of medical certainty, as to whether or not there might be a casual relationship between the condition of illbeing as set forth in the hypothetical question, and the accident of July 2, 1952, referred to in the question?

A. Yes.

Mr. Bunn: I am going to object, your Honor, to all the assumptions in the hypothetical question, unless they will be proven up by Mr. Rafferty.

The Court: I assume that to be correct.

Mr. Rafferty: He is correct on that, your Honor. I will have to prove them up.

The Court: You say you have an opinion?

The Witness: Yes.

By Mr. Rafferty:

Q. What is your opinion?

51 A. I believe there could be a connection.

Q. Doctor, in your opinion, is there a casual relationship between the accident referred to, the treatment referred to in the hypothetical question, and the present complaint of the individual about instability in the left knee, continued pain in the left knee, and the swelling of the left knee upon use thereof?

A. Yes, I believe so.

Q. In your opinion, Doctor, is the condition of illbeing as set forth in the hypothetical question of temporary or permanent nature?

A. It is of a permanent nature.

Q. In your opinion, Doctor, is there any need of further medical attention or surgery?

A. I don't believe any further treatment is indicated.

Mr. Rafferty: Cross examine, Mr. Bunn.

Cross Examination by Mr. Bunn:

Q. Doctor, prior to the first visit that Mr. Webb made to your office, on or about September 3, 1952, you had never met Mr. Webb, had you?

A. No.

Q. He was never a patient of yours?

A. No.

52 Q. He was referred to you by Mr. Rafferty?

A. That is correct.

Q. For examination only, is that right?

A. That is correct.

Q. And on these four visits you gave him no treatment whatsoever?

A. That is correct.

Q. Now, I think you said, Doctor, on September 3, 1952, you found atrophy of disuse of the quadriceps muscles, is that correct?

A. That is correct.

Q. And this atrophy of disuse, that is a temporary wasting away, is it?

A. Not always.

Q. Not always?

A. Not always.

Q. It may be permanent if disuse is prolonged for a sufficient period of time?

A. Correct.

Q. When you saw Mr. Webb, was he out of the cast at that time?

A. Yes.

Q. But his leg had been in a cast, had it not?

A. Yes.

53 Q. And his leg being in a cast, it would be in an immobile position, is that right?

A. That is correct.

Q. And ordinarily, anytime the leg is immobilized, isn't that the reason for the atrophy that you find?

A. Anything that stops the muscles from being used, a cast or a splint, or disease, can cause atrophy. Even amputation, where you cut the leg off, say at the knee, the thigh muscles don't have to work the knee any more, so they atrophy.

Q. Once the limb is used again, why, in the normal course of events, say, in the vast majority of instances, the atrophy soon slowly disappears as the muscles regain their muscle tone, isn't that correct?

A. Usually. In some cases it does not.

Q. I think you also said on your September 3, 1952 examination of Mr. Webb, at that time he had a ten degree limitation of the extension of the left knee?

A. That is right.

Q. And a twenty per cent limitation of flexion, is that correct?

A. Yes.

Q. And you found no fractures?

A. No fractures, that is correct.

54 Q. The next time you examined Mr. Webb was about two months and a week or so later, is that correct?

A. On November 12, 1952, yes.

Q. I think you said at that time he had a normal range of extension and flexion, is that correct?

A. That is correct.

Q. In other words, by that you mean that he could bend his knee as far as a normal individual could, and could straighten his knee as far as a normal individual could?

A. At least as far as the other leg. That is the way you usually compare it, by comparing the opposite.

Q. And you found no injury to the other knee?

A. No.

Q. You also mentioned something else on the November 12, 1952 examination. Did you say that there was a satisfactory rotation, or what was the word you used?

A. The test for stability was satisfactory.

Q. The test for stability was satisfactory?

A. Yes. In other words, we tested for the two sets of ligaments to see whether they loosened up any.

Q. You found they were not loosened up?

A. As far as we could tell.

Q. Well, you considered them satisfactory, did you not, Doctor?

55 A. Found nothing that I could find wrong with them.

Q. On your examination of Mr. Webb on November 12, did you know that he had just recently left the Illinois Central Hospital?

A. Yes. My history shows that until October 8 he had been receiving physiotherapy treatment there. He was discharged on or about the 8th of October.

Q. Now, this crepitation on motion you said you found in both knees, is that correct?

A. That is correct.

Q. And you have given quite a few measurements. I was not able to catch them all. The measurement, for example, at the patella, on your examination of November 11, $14\frac{1}{2}$ for the left, and $14\frac{1}{4}$ on the right?

Mr. Rafferty: That is November, 1954.

By Mr. Bunn:

Q. I am sorry. That was November of 1954.

A. 1954?

Q. Yes.

A. November 11th, the patella, $14\frac{1}{4}$ on the right, and $14\frac{1}{2}$ on the left.

The Court: Tell the jury what the patella is.

The Witness: The patella is the knee cap, right in front of your knee, and that is the level you put a tape
56 measure around, the middle of the knee cap.

By Mr. Bunn:

Q. Let me ask you: a difference of that sort, wouldn't you find that in almost any individual who would have normal knees, without any derangement or any involvement in the limbs whatsoever; couldn't there conceivably be that much difference in the circumference in the limbs?

A. Yes, but coupled with what you can see—you can take your tape measure and change the measurements, if you do it wilfully, but if you try to be very careful, you should find the circumference within an eighth of an inch at that particular level. Measurements up here in the thigh or a little harder, because the tissues are softer. It is not the best way. Your eye tells you more, but your measurements show it more graphically.

Q. Wouldn't your measurements be more correct than what you could see with your eye?

A. Sometimes, and sometimes not. In this particular case I think anybody could see the thigh atrophy if they took a look at it.

Q. Could you see the difference of a quarter of an inch?

A. You could see where the measurements don't show so much difference, the eye will show you much more, and you would expect to look at the leg to find more, because sometimes your atrophy is immobilized.

Q. This was at the patella region?

A. The patella region don't tell anything about atrophy.

Q. It is quite possible, for example, that the measurements of each one of your legs in the patella region may be a quarter of an inch off?

A. It is possible.

Q. Or mine, isn't that possible, Doctor?

A. That is possible.

Q. In other words, that is no great variation, is it?

A. No, it is not a great variation, but coupled with other findings and what you can see, it has significance.

Q. Now, again, in February—what was the date, the 17th—of this year?

A. Yes.

Q. You saw Mr. Webb again, and again you found these measurements that, by and large, a difference in the circumference of the calf and the knee, was about half an inch, would be about half an inch lesser in the left than in the right, is that right?

A. No, at the calf it is a quarter of an inch. At the calf it is smaller in the left. The knee is larger at the patella and the thigh is smaller. That means essentially a little swelling at the knee, a little smaller in the thigh and calf.

Q. You never examined Mr. Webb before the occurrence he complains of in this suit?

A. No.

Q. So you don't know whether that is the normal finding or not?

A. All I know is what I saw in my examinations.

Q. You don't know whether that was his normal measurement before the injury?

A. I know it is not the normal measurement.

Q. I will ask you again, you don't know whether or not these measurements that you found were the same measurements that Mr. Webb had before July 2, 1952?

A. No, I don't know anything that happened before I first saw him.

Q. So they may be perfectly normal, may be the same measurements Mr. Webb had before the injury, is that correct?

A. They even varied in my various measurements, so we don't expect them to be the same from year to year. There is a variation.

59 Q. Ordinarily, with the use of the limb, the atrophy would not be so noticeable, would it?

A. If the limb is used sufficiently and soon enough, you get practically a return to normal muscle size; but if the limb is not used for a long period of time, or if for some reason it is still not being used, the atrophy persists. When it persists for a certain length of time, then it may be permanent.

Q. You know generally what the duties of a railroad brakeman or flagman are?

A. I know a little.

Q. You do know a little?

A. Yes.

Q. You know it requires switching?

A. Yes.

Q. It requires getting up on and off of cars?

A. That is correct.

Q. It requires sometimes quite a bit of walking back and forth?

A. That is correct.

Q. Now, in the ordinary course of events, if a man continued—if he was off for say, four or five months, and went back on the job and continued working quite regularly, as up to the present, you would not expect to
60 find much atrophy in that time, would you?

A. I don't quite get your question.

Q. Well, you say there is still atrophy in the left thigh when you last saw him, the day before yesterday, is that true?

A. That is right.

Q. Although he had full range of extension and flexion, is that true?

A. That is right.

Q. You also found a difference in the calf and a difference in the knee, I think. Is that true?

A. That is right.

Q. And you say that this man was still suffering to some extent, this Mr. Webb was still suffering and had suffered some residual permanent disability, is that right?

A. That is right.

Q. Well now, ordinarily, if a man, say he had a lay-off of four or five months, and one of his legs did not receive too much use during that period, but that he went back to work and did the work of a switchman for a period of about two years and two or three months, would you ordinarily expect to see the atrophy pretty well diminished?

A. It would be pretty well diminished, if there was 61 nothing wrong with his leg.

Q. Well, you know the work of a brakeman, don't you?

A. Yes.

Q. In your opinion, wouldn't that be a fairly strenuous job and make fairly strenuous use of that leg?

A. That is correct.

Q. Mr. Rafferty in the hypothetical question that he propounded to you, asked you, and you answered that there was, in your opinion, some permanent disability still in that leg, is that correct?

A. Yes.

Q. As far as the hypothetical man was concerned?

A. Yes.

Q. Well, now, if you would add to that hypothetical question the additional facts, that the hypothetical man from, say, December of 1954, to the present, has worked continuously and has not missed one trip as a railroad brakeman or flagman, would you say that that man with reasonable probability would be able to continue to do railroad work?

Mr. Rafferty: I object. If counsel proposes to connect up the fact that at a later time Mr. Webb has missed no time from work since returning, I have no objection 62 to the modification of the hypothetical question.

Mr. Bunn: Just to this extent, your Honor, that I don't think—if I did, I am sorry, but I don't think in the hypothetical question, the additional facts, that I made any reference to the fact that he had missed no time since he was working. I called attention to the time from December 4th until the present.

The Court: Restate your question.

By Mr. Bunn:

Q. Doctor Stotz, considering all the assumptions Mr. Rafferty made in propounding to you the hypothetical question, if you had the additional assumptions before you that this hypothetical man did the work of a railroad brakeman or flagman, had worked through December, 1954, January, 1955, and right up to the present, worked regularly, without missing one of his trips, wouldn't that indicate to you that he was capable of doing railroad work?

A. It would certainly indicate he was capable of doing his work, yes; but that has nothing to do with the findings I found in the knee.

Q. But you would say he is capable of doing the work, is that right?

63 A. If he has been doing it, it is probable that he is capable.

Q. Doctor Stotz, at any of these examinations you made of Mr. Webb, did you at any time consult with any of the members of the staff at the I. C. Hospital concerning what treatment they had given Mr. Webb?

A. No.

Q. What compensation do you expect for these examinations and this testimony here in court today?

A. Well, I haven't given any thought to what the testimony will cost, but I do have the bills here, if you would like to see them.

Q. If you could just give them to me, Doctor.

The Court: You want the amounts and dates, I take it?

The Witness: The one I probably have missing, is the report of that one examination, but that will be a \$10 examination. I don't have the bill for that one.

The Court: What is the total?

The Witness: I will have to add it up, sir.

The Court: All right.

The Witness: There are four reports, and two sets of x-rays. \$60.00 or \$70.00, somewhere in that neighborhood; maybe a little more or less.

I don't have all the statements attached here.

By Mr. Bunn:

Q. What do you expect to charge for your testifying in court?

A. I usually charge \$25 when I come up, if it doesn't take too much time.

Q. Have you sent out any bills yet to Mr. Webb?

A. No. I have sent a couple to Mr. Rafferty for the examinations.

Q. Have they been paid?

A. I think all the bills have been paid, as far as I know, except yesterday's report. I haven't sent any bill on that yet.

Mr. Bunn: That's all.

Redirect Examination by Mr. Rafferty:

Q. Doctor Stotz, if a man favored his leg because of pain in the knee, would you expect to find a condition of atrophy and disuse in that leg?

A. Yes.

Q. Mr. Bunn asked you, Doctor, whether or not you observed crepitation in both Mr. Webb's knees, and I believe you stated you did.

A. Yes.

Q. Did you observe more in the left knee, which was the site of the operation, or more in the right?

A. More in the left. I mentioned that.

Q. Now, Doctor, Mr. Bunn inquired as to your charges for your examinations, your x-rays, and your reports, and for your compensation for coming to court. Are those the usual customary charges, Doctor, for services of that type rendered in this city?

A. That is right.

Q. Doctor, have you had occasion to testify in court before?

A. Yes, I have.

Q. Doctor, will you tell the Court and jury the approximate per cent of the times that you appear in court re-

presenting defendants as compared to the per cent of times you appear in court representing plaintiffs?

A. Probably more for defendants.

The Court: What?

The Witness: Probably more for the defendants. I don't come into court very often, probably once a month, once every two months,

Mr. Bunn: How often, Doctor?

66 The Witness: Once a month or once every two months.

By Mr. Rafferty:

Q. Doctor, are you not examining physician for the Lumbermen's Insurance Company?

A. That is correct.

Q. And represent that concern in the handling of their industrial accidents?

A. Yes, I do.

Mr. Rafferty: I believe that is all, Doctor.

Recross Examination by Mr. Bunn:

Q. Doctor, we have met before, haven't we, in court?

A. Yes, I believe the last time I was in court I met you, in the last case I was over here.

Mr. Bunn: No other questions, your Honor.

Redirect Examination by Mr. Rafferty:

Q. At the time you met Mr. Bunn, that was approximately a year and a quarter ago, was it not, Doctor?

A. Wasn't he in the one with Doctor Mason? I have him mixed up with another man.

Mr. Rafferty: That is all, Doctor.

67 (Witness Excused.)

The Court: The jurors will remember your instructions. You are excused now until 10:00 o'clock Monday morning.

(Whereupon an adjournment was taken to 10:00 o'clock a.m., Monday, February 21, 1955.)

68 * * (Caption No. 53 C 1687) * *

Before Judge Sullivan and a Jury, Monday, February 21, 1955, 10:00 o'clock a.m.

Court met pursuant to an adjournment.

Present:

Mr. Robert J. Rafferty,
Appeared on behalf of the Plaintiff;
Mr. William F. Bunn,
Appeared on behalf of the Defendant.

The Court: You may proceed.

Mr. Rafferty: Ladies and gentleman of the jury: We have agreed that on September 15, 1952, at the time of the operation on Mr. Webb in the Illinois Central Hospital, that it was observed that he had a torn cartilage in his left knee, that being the same knee that Doctor Stotz referred to, and because of the reason that the
69 cartilage was torn, the operating surgeon thought it necessary to remove it, and did remove it. Thank you.

JOHN WEBB, the plaintiff, having been theretofore
70 duly sworn herein, resumed the stand and testified further as follows:

Direct Examination by Mr. Rafferty:

Q. Mr. Webb, I believe at the time you were on the stand last, you were referring to an examination by Dr. Sinow in Clinton?

A. Yes, sir.

Q. When was the first time you saw Dr. Sinow in connection with this occurrence?

A. On the evening of January 2, 1952.

Q. You mean July 2nd?

A. July the 2nd, pardon me.

Q. That was the same day as the accident?

A. Yes, sir.

Q. What did Dr. Sinow do for you or prescribe for you at that time, if anything?

A. He examined my knee and taken two X-rays of it, and told me to come back the next day.

Q. Now, the next day did you return to Dr. Sinow's office?

A. Yes sir.

71 What did he do for you at that time, Mr. Webb?

A. He gave me an electrical treatment on the knee.

Q. And do you recall how long Dr. Sinow continued the treatment of your knee?

A. I believe July the 17th.

Q. And what type of treatments were those during that period of time?

A. The same thing, electricity.

Q. How did you get around during that period of time?

A. On crutches.

Q. And who prescribed the crutches for you?

A. Dr. Sinow.

Q. Now, did you continue under Dr. Sinow's care after July 17th, or were you referred elsewhere?

A. I was referred to the Illinois Central Hospital, Chicago, Illinois.

Q. And did you come to the hospital?

A. Yes, sir.

Q. And approximately how long did you stay in the hospital, if you remember?

A. I believe July the 28th.

Q. And what was done for you in the way of care and treatment at the hospital?

A. Physiotherapy.

72 Q. What type of treatment is that?

A. Heat treatment.

Q. Now, on July 28th did you leave the Illinois Central Hospital?

A. Yes, sir.

Q. Did you have any instructions at that time with reference to additional medical care?

A. They referred me back to Dr. Sinow.

Q. When you returned to Dr. Sinow, what did he do for your left knee?

A. He put my left leg and knee in a cast.

Q. And do you recall the day he put the knee in the cast?

A. About August the 4th, I believe.

Q. Will you be good enough to tell the Court and jury the part of your leg that was enclosed in the cast, the area that was covered by the cast?

A. From the ankle to well above the knee.

Q. How long did your leg remain in the cast, Mr. Webb?

A. About three weeks, I believe.

Q. Would that be up to about August 25th, then?

A. Yes, sir.

Q. During that period of time, from the date the
73 cast was applied, on or about August 4th, to the date it was taken off, on or about August 25th, was any care given you for your leg, anything done for it, while the cast was on?

A. No, sir. there was nothing done other than I went back to Dr. Sinow to let him check the cast for looseness.

Q. How did your leg feel during this period of time?

A. Well, it was paining me a lot, and was sore.

Q. After the cast was removed, what, if anything, was done for your leg in the way of care or treatment?

A. Well, he gave me the same kind of treatment that he gave me before.

Q. And do you recall how long those treatments continued?

A. Up until September the 9th, I believe.

Q. And what, if anything, was done for you then, on September 9th?

A. He referred me back to the Illinois Central Hospital in Chicago.

Q. Do you recall approximately when you re-entered the Illinois Central Hospital?

A. I believe it was the 9th.

Q. And what, if anything, was done for you in
74 the hospital during that period of time?

A. They gave me physical examination of the knee, the day that I entered the hospital, and re-examined my knee, and that was all that was done that day.

The Court: A little louder, please.

The Witness: That was all that was done that day.

By Mr. Rafferty:

Q. During this period of time, after the cast was removed and up to the time you entered the Illinois Central Hospital, how did your knee feel at that time?

A. Still sore and stiff. It felt like it was going to lock on me. I couldn't straighten my leg all the way out, and could not bend it.

Q. How did you get around during that period of time?

A. On the cast.

Q. After the cast was removed, and before you went in the hospital, how did you get around then?

A. Well, just walked; I did not have no cane or anything.

Q. What day were you operated on, John, do you remember?

A. September the 13th.

Q. That would be 1952?

75 Yes.

Q. Do you know who performed the operation?

A. Dr. Guy.

Q. And what was done for you during your stay in the hospital there after the operation?

A. They aspirated the knee.

Q. When you say aspirated, what do you mean by that, John?

A. Put a needle in above my kneecap.

The Court: Talk just a little louder, please.

The Witness: They put a needle in above my kneecap and withdrew some fluid out of it.

By Mr. Rafferty:

Q. Now, with reference to the fluid that you refer to, was any condition visible about your knee that told you you had fluid there?

A. Yes, it was swollen very much.

Q. Do you recall how long you remained in the Illinois Central Hospital after the operation?

A. I believe it was in November — no, October. I believe I was discharged in October.

Q. And what was done for you in the hospital in the way of care and treatment for the knee?

A. They gave me heat treatments on my knee,
76 and massage, and a whirlpool bath.

Q. Was any course of exercises prescribed for you?

A. Yes, sir. They exercised my leg with weights attached to my foot.

The Court: Who prescribed that?

The Witness: The doctor, I suppose.

The Court: Who was the doctor?

The Witness: Dr. Guy.

The Court: All right.

By Mr. Rafferty:

Q. How was the weight attached to your leg, John?

A. Well, it was a cable that ran through a pulley that was attached to my ankle, my foot, and run back beneath me on a table and up through another pulley, and down, with the weight on the other end of the cable.

Q. What did you do then?

A. I would work my leg back and forth like that (illustrating), lifting those weights.

Q. Now, after your discharge, which I believe you stated was some time in October, did you have occasion to return to the Hospital as a patient or did you return and stay home?

A. Yes, I returned for further observation every two weeks thereafter until I was released.

77 Q. How did you feel at the time you were released from the hospital; how did your knee feel?

A. It was still sore, weak, and it pained me some.

Q. What, if anything, did you observe with reference to the swelling of the knee?

A. It was still swollen a little bit.

Q. When did you return to work at the Illinois Central Railroad?

A. December 10, 1952.

Q. What type of job did you return to at that time?

A. Through freight service.

Q. Was that the job that you were holding down at the time of the injury and before it?

A. No, sir.

Q. For what reason did you return to the through freight service?

A. It was lighter work; there was less walking, less climbing, shorter hours.

Q. And when you returned to work, did you receive any help from the crew at the time you first returned?

A. Yes, sir, I did.

Q. What was the nature of the help, what kind of help?

A. They would throw the switches for these tracks I was supposed to throw, and when we would make a

78 stop where we had to inspect the train, the other members of the crew would do the work of inspecting the train; and if we had cars to set off or take on, they would do it.

Q. You have referred, Mr. Webb, to a condition of swelling and fluid in the knee. Can you tell the Court and jury how long that condition remained, how long you observed it? Do you recall how long the swelling remained in your knee that you could observe?

A. Well, I can observe it yet today.

Q. After the operation, when you were able to get about on your feet, what, if anything, did you notice with reference to the knee, how it felt, how it appeared?

A. Well, it was very weak, unstable. I could not go up and down stairs. It was very painful when I put my weight on it, when I would step up, and naturally I had to go up a step at a time.

Q. What, if anything, do you observe about the condition of it now, at the present time?

A. It is the same way.

The Court: What?

The Witness: It is the same way.

By Mr. Rafferty:

79 Q. I wonder if you would be good enough to pull up your pants leg and indicate to the jury the area of the operation, and the length of the scar.

A. The scar runs from here to there (indicating).

Mr. Rafferty: Turn around, so his Honor can see it, too.

The Court: All right.

By Mr. Rafferty:

Q. John, do you recall your earnings in the course of your employment with the Illinois Central Railroad in the year 1950, the amount of them?

A. Well, it was around \$5,000.

Q. In 1951, the year preceding the accident?

A. It was a little over \$7,000, I believe.

Q. I show you your withholding slip for the year 1951, and ask you if that refreshes your recollection as to your earnings during the calendar year 1951?

A. Yes.

The Court: If you show them to counsel, he may agree on it.

Mr. Rafferty: May I have permission to read that to the jury?

The Court: That you have agreed on. If you are 80 going to introduce them in evidence, have them marked.

Mr. Rafferty: I did not plan to.

The Court: All right.

Mr. Rafferty: Mr. Webb's earnings in the calendar year 1951 in the railroad employment were \$7,052.25;

In the calendar year 1952 his earnings were \$3,645.93;

In the calendar year 1953 his earnings were \$5,180.63;

And in the calendar year 1954 his earnings were \$5,648.- 29.

By Mr. Rafferty:

Q. Mr. Webb, what type of a job were you holding down in the railroad employment in the year 1951, the year before this accident happened?

A. I was on a local most of the time.

The Court: A little louder, please.

The Witness: I was on the local freight most of the time.

By Mr. Rafferty:

Q. And in the year 1952, up to the time of the accident, what type of service were you in?

A. Mostly local.

81 Q. And in the year 1953, after you returned to work, what type of service did you go into?

A. Through freight.

Q. And in the year 1954, what type of service were you in?

A. Through freight.

Q. What is the difference, Mr. Webb, between the type of job you held before the accident and the type of job you held after the accident up to this time?

A. The type of job that I held before the accident, the local job you mean?

Q. Yes.

A. Well, it meant more money for one thing.

Q. And from the standpoint of physical work required, what was the difference?

A. It was a lot harder work; longer hours; there was quite a bit of overtime involved on the local.

Q. Does your seniority entitle you to work a job on the local freight at the present time?

A. Yes, sir.

Q. Why, then, are you working on other types of jobs, Mr. Webb?

A. Well, it is an easier job; it is not as long hours; not on duty as long; have a longer layover, rest 82 period. It is easier work, not nearly as much walking, not as much of switching.

Q. Mr. Webb, have there been any increase in compensation of brakemen since July of 1952 to the present time?

A. July of 1952?

Q. Yes.

A. Yes, there have been.

Q. Do you recall the amounts of the increases and when they were made, Mr. Webb?

A. Well, I don't just exactly know. I was getting \$11.06 per day, I believe, in July. At the present date it pays \$12.82.

Mr. Rafferty: Mark this Plaintiff's Exhibit 1 for identification.

(Whereupon said document was marked for identification Plaintiff's Exhibit 1.)

By Mr. Rafferty:

Q. Mr. Webb, I show you Plaintiff's Exhibit 1 for identification, and ask you if that is a schedule of the pay increases for brakemen that has been prepared by you from your records, showing the rates of pay and rates of increases?

A. Yes, sir, it is.

83 Q. Tell the Court and jury, Mr. Webb, the pay scale as of July 1952 in a regular freight and the increases in that type of service since that time, July, 1952.

A. Regular freight paid \$12.55 per day.

Q. Tell us the increase after that then.

A. October 1952, it paid \$12.71 per day.

The Court: Well, again, if you show it to counsel, he may agree on it and you may read it instead of having him read it.

Mr. Bupn: Except, it should be subject to cross-examination before it is admitted. I have never seen this be-

fore, so I could not verify the correctness of it.

The Court: All right, go ahead.

By the Witness:

A. (Continuing) January, 1953, regular freight paid \$12.61;

April, 1953, \$12.57;

July 31, 1953, \$12.71;

October, 1953, \$12.95;

December 1, 1953, \$13.35 per day.

By Mr. Rafferty:

Q. Now, on the local freight service, what was the rate of compensation in July 1952, and what if any increases have there been since that time?

A. July, 1952, local freight paid \$13.02 per day;

October, 1952, \$13.18 per day;

January, 1953, \$13.10 per day;

April, 1953, \$13.04 per day;

July, 1953, \$13.18 per day;

October, 1953, \$13.42 per day;

December 1, 1953, \$13.82 per day.

Q. Now, John, preceding the happening of this accident, did you have any occasion in any previous year to have a physical examination of your person by the company?

A. Yes, sir.

Q. When was that examination made, if you recall?

A. 1950 I was passed in physical examination.

Q. What was the condition of your left knee and left leg at that time?

A. O. K.

Q. And on July 2, 1952, before the accident happened, what was the condition of your left leg and left knee?

A. It was still all right.

Q. John, getting back to the happening of the accident itself, I am not sure if I brought it out or not, but did you have occasion to look down before you took this step, at which time you had the accident — did you have occasion to look at the ground?

A. Yes, sir.

Q. What, if anything, did you see then?

A. It was level, looked like good footing, outside of being a little loose.

Q. After the accident happened, did you have occasion to look down at the ground?

A. Yes, sir.

Q. And what, if anything, did you see then?

A. I saw a large clinker laying there.

Mr. Bunn: This has already been gone into.

The Court: I think you have covered that.

By Mr. Rafferty:

Q. John, did you have any occasion at that time to see where the clinker had been?

A. Yes, sir. There was a hole right by the side of the clinker.

Q. Now, John, based on your knowledge and experience as a section hand in the employment of the railroad, and based on your observation as a brakeman and switchman since that period of time, will you tell the Court and jury whether it is the custom and practice to use clinkers approximately the size of a man's fist in a railroad roadbed?

A. No, sir.

Q. Why not, Mr. Webb?

A. Well, it doesn't pack down; it doesn't give good footing; and it cannot be tamped in under the ties for support.

Q. Did you know that the clinker that you have referred to was at this location before you stepped on it?

A. No, sir.

Q. Will you tell the Court and jury what you did with it after the accident happened?

A. I picked it up and cast it across the L & N track, off of the right-of-way.

Q. For what reason did you do that?

A. I threw it away to keep from somebody else stepping on it and maybe being injured. I done it as a safety precaution.

Mr. Rafferty: You may cross-examine, counsel.

Cross Examination by Mr. Bunn:

Mr. Rafferty: No objection, if you want to offer it.

Mr. Bunn: I would like to point out, ladies and gentlemen, that Mr. Rafferty and myself have stipulated and agreed that this photograph, which will be

marked Defendant's Exhibit 1, substantially represents the conditions around the house track switch here on or about July 15, 1952.

The Court: Was that admitted without objection?

Mr. Rafferty: Yes. No objection, your Honor.

(Said photograph, so offered and received in evidence, was marked Defendant's Exhibit 1.)

By Mr. Bunn:

Q. Mr. Webb, on July 2, 1952, I think you have already stated you were working at that time as a brakeman, is that correct?

A. Yes, sir.

Q. A flagman, brakeman?

A. Yes, sir.

Q. You were working the rear end of the train?

A. Yes, sir.

Q. And your train went from Clinton to East St. Louis and returned to Clinton, is that right?

A. It came from East St. Louis, went on the way
88 to Clinton.

Q. And then it returned to East St. Louis?

A. That would be the next day.

Q. Now, you mentioned that during the year of 1952 you were working mostly on the local freight run, is that right?

A. Yes, most of it.

Q. And that is the same run that you were on, on July
2, 1952?

A. The same run.

Q. Now, there are other runs, are there not, out of Clinton, for example, you have the passenger run, do you not?

A. Well, I am subject to call for extra passenger service, yes, sir.

Q. And you also have the through freight run that you have been working on since this occurrence, isn't that true?

A. Yes, sir.

Q. And you have other local runs, do you not, down in your district?

A. Yes, sir.

Q. And what other local runs do you have?

A. I have a job that works opposite to the one that
89 I was on.

Q. How do you designate that run?

A. Well, the run I was on originated at East St. Louis on Monday morning.

Q. The trains just more or less meet each other, is that right?

A. Yes. My layover was on Saturday, layover was in St. Louis; and on the opposite job Saturday layover was in Clinton.

Q. Now, in addition to that, you have what is also designated down there as the Mt. Pulaski local, don't you?

A. Yes, sir.

Q. Now, what other positions were you working on of these runs now we have already discussed; what other positions were you working in the year of 1952?

A. I don't just understand your question.

Q. Well, let me see if I can restate it. You said during the year 1952 you were working mostly on the local freight run, is that correct?

A. Yes.

Q. Now, you were working on other jobs in addition; it was not wholly local freight runs before this occurrence in 1952?

90 A. Well, I acted as conductor I think a few times on the local.

Q. I see. Did you ever work on the through freight?

A. I was on through freight for a while.

Q. What position did you hold on the through freight?

A. I believe I was flagman most of the time.

Q. And that is the position that you have been in since the occurrence most of the time, is it not?

A. Yes, sir.

Q. Now, you have worked on the passenger run, have you not, before July of 1952?

A. Yes, sir.

Q. What positions have you held in the passenger run?

A. I was flagman, and also baggage man. Whichever job they called me for would be the position that I filled.

Q. Now, down in your territory, you work according to the seniority that you have. Doesn't the seniority that

you have determine the jobs that you can bid on and take from day to day?

A. Yes, sir.

Q. And if you are a young man, usually you don't have such a good choice, but as your seniority accumulates the choices become better, do they not?

91 A. Yes, in some cases, in the sense of the word that you can take whatever job that you are old enough to take. It may not be a better job. It might be a better job sometimes.

Q. But the choice is left up to you, if you have seniority, to bid, say, any one of one, two or three possible positions open during the day. If you have enough seniority, there are times when you can take any of the jobs you want to, are there not?

A. Well, there are conditions attached to that. We have rulings down there, the Brotherhood of Railway Trainmen rulings, that prohibit you from exercising your seniority only on certain positions.

Q. I see. Well, you worked on the passenger end of it during 1952, didn't you?

A. I don't recall if I was on passenger in 1952 or not. I would have to refer to my time book.

Q. All right. Then you worked on the through freight before July of 1952, didn't you?

A. Yes, sir.

Q. Now, on July 2, 1952, you were working as a brakeman, is that correct?

A. Brakeman-flagman, brakeman.

Q. And a brakeman works under the conductor,
92 is that right?

A. Yes, the conductor is the supervising officer.

Q. Now, the conductor, as I understand it, has considerably less physical work to do, is that right?

A. Yes, sir.

Q. And from January to July of 1952, you had often acted as conductor on the local, had you not?

A. I believe a few times. I could not say just how many. I would have to refer to the record of my time.

Q. And at other times before July 2, 1952, you would switch over to the through freight run and work that for a while?

A. Yes, sir.

Q. Now, conductor's pay, for example, is better than that of a brakeman on any given run, isn't it?

A. Yes, sir.

Q. So that, when a conductor's opening would appear, you would, as probably all of us would do, you would take the conductor's position?

A. No, sir. I never had that much seniority.

Q. You did not in 1952?

A. No, sir. I still haven't got it.

Q. But when the opening did present itself, you would ordinarily take it, wouldn't you?

93 A. If I stood for the job, what I mean, if the seniority entitled me to be called for the job, I would either go on it or lay off.

Q. And by the same token, if you have a great deal of seniority, if there is a good job available, and not quite so good a job available, you don't necessarily have to take the best job, do you?

A. No, sir, you do not.

Q. You can take the lesser of the two jobs; in other words, it is left up to your preference?

A. Yes, sir, it is up to you whether you want the job or not.

Q. You have been a promoted conductor since 1941, have you not?

A. 1941; yes, sir.

Q. But that does not necessarily mean you work all the time as a conductor, does it?

A. No, sir.

Q. But you do some work as a conductor?

A. Some.

Q. And I doubt if there is anyone that right now knows exactly when he will be due for any work as a conductor, is there?

A. No, sir.

94 Q. There are a lot of factors to consider?

A. Yes, there are.

Q. Business conditions?

A. Yes.

Q. That may affect it, may it not?

A. Yes.

Q. And the fact that men may retire earlier, or they may pass on sooner, or they may resign — all of those factors enter into it?

A. Yes, sir.

Q. But at this time you have about close to what — thirty years seniority, is that correct?

A. Well, as a brakeman, no, I haven't.

Q. How much seniority have you?

A. I have about nineteen years.

Q. Nineteen years seniority as a brakeman?

A. Since 1935.

Q. Now, from the time that you returned to work in December of 1952, Mr. Webb, until at least on or about November 4, 1954, your leg had never gone out from under you, had it?

A. No, sir.

Q. You have never had to leave the job before you completed your required number of hours because of the pain in your leg, have you?

A. No, sir.

Q. Now, when you returned to work in December of 1952, you returned to what, through freight work?

A. Through freight service, yes.

Q. And you did not miss any one of your regularly scheduled trips all during the month of December, did you?

A. No, sir, I did not.

Q. December is ordinarily a pretty bad month, is it not?

A. Yes, sir.

Q. And on the job as a brakeman on the through freight, you still do have to do a certain amount of physical work, don't you?

A. Sir?

Q. I say, on a job as a brakeman on the through freight from East St. Louis to Clinton and return to East St. Louis, you still are required to do a certain amount of physical work?

A. Yes.

Q. You still have to do a certain amount of switching?

A. Yes.

Q. You still have to do a certain amount of walk-
96 ing, don't you?

A. Yes, sir.

Q. You still have to do a certain amount of coupling and uncoupling of cars, don't you?

A. At times, yes.

Q. And get on and off of moving cars?

A. Yes, sir.

Q. Of course, the amount of those various items I just referred to, the amount of switching, etc., getting on and off cars and all that, that is not quite as strenuous as on the local freight, is that right?

A. It is just as strenuous, but there is not as much of it.

Q. I see. Just as strenuous?

A. Yes, sir.

Q. Now, in the year 1951, Mr. Webb, do you know off-hand about how many trips you missed during the year?

A. I would have to refer to my time book.

Q. Do you have any idea at all? Was it ten a year?

A. I don't believe it was.

Q. You don't think it was ten?

A. No.

Q. It is something less than ten then?

A. Yes, I doubt if I missed over three or four
97 trips.

Q. Three or four trips over the entire year?

A. Yes. As I said, I would have to refer to my time book.

Q. I understand you may not remember exactly. I just wanted your best idea. Now, you did not work at all until you returned to work on December 9th or 10th, is that correct?

A. Yes, sir.

Q. And then you missed no trips during December of
1952?

A. No, sir.

Q. Now, during the year 1953, approximately how many trips did you miss?

A. I would still have to refer to my time book.

Q. Refer to your what?

A. To my time records.

Q. Well, about two months ago didn't you have somebody from the I. C. compile that information for you?

A. Yes, sir.

Q. And you don't remember now what you missed in 1953?

A. No, I don't remember what the amount of it was.

Q. Now, what about 1954, Mr. Webb? How many trips did you miss in 1954?

98 A. I still would have to refer to my time book. I could not tell offhand.

Q. Well, can we assume that you missed no trips?

A. In 1954?

Q. Yes.

A. I was off —

The Court: You were what?

The Witness: I laid off a couple of times.

By Mr. Bunn:

Q. A couple of times in 1954?

A. Yes, sir.

Q. In 1951 you laid off three or four times, you think?

A. I expect, yes.

Q. And how many times have you laid off in 1955 up until the time you came up for this lawsuit?

A. I think about three or four times.

Q. You have missed three or four trips from the beginning of this year up to — and I am not including now the time you took off to come up to this lawsuit — do you think you missed three or four trips in that period?

A. Well, I have stood for a couple of jobs that went out that I could have went out on while I was lying off.

Q. You think you missed three or four trips?

99 A. Yes, I think so.

Q. Did you miss them in January or this month?

A. I believe it was this month.

Q. You missed three or four trips in February, 1955?

A. I believe I laid off a couple of times in February.

Q. I am not trying to confuse you.

Mr. Rafferty: Let him finish.

Mr. Bunn: All right.

By the Witness:

A. (Continuing) I think I laid off the 15th of January.

I don't believe I laid off any more then until the first period of February.

By Mr. Bunn:

Q. And how many trips did you miss this month?

A. Well, as I said, there was two jobs went out I could have went out on if I had not laid off.

Q. Well, did you miss two trips, then, in February?

A. If you mean on my regular job, two trips on my own job that I am holding now?

Q. I am not concerned particularly whether you worked on one job one day and another job the next day. I am concerned with whether or not you stayed off and missed some trips when ordinarily you would have worked 100 during that period of time.

A. Yes, I did. I missed, as I said before, I missed two jobs that I could have went out on. The younger men in seniority than I was went out on the jobs.

Q. Now, since you returned to work in December of 1952, you have worked quite a few times on the Mt. Pulaski local, haven't you?

A. Yes, sir.

Q. As a conductor?

A. I think maybe a couple of times as conductor.

Q. And as a brakeman?

A. Yes. I believe I have made about eight or ten days as a brakeman.

Q. And the Mt. Pulaski local, as I understand, has three brakemen instead of two, isn't that right?

A. Yes.

Q. But it is local work that requires a good deal of switching, does it not?

A. Yes, sir.

Q. And do you recall when you did that work, Mr. Webb?

A. The latter part of December, 1954 I was on it.

Q. Do you recall a period about a month, running roughly from about June 18th to about July 10th, 1954, when you were working either as a brakeman or conductor on the Mt. Pulaski local?

101 A. Yes. I don't just recall the dates, but I was on there a few trips.

Q. That was a period of about a month, was it not?

A. No.

Mr. Rafferty: According to your calculation, three weeks.

By Mr. Bunn:

Q. Three weeks?

A. No, sir, it was not. It was just a few trips.

Q. Now, do you recall, on November 4th I believe it was, 1954, you came up to Chicago? I think that is the first time we met, in November 1954, in Mr. Rafferty's office.

A. Yes.

Q. And you missed a trip that day, did you not?

A. I don't know if I did or not. I don't know. I suppose I did.

Q. And on or about November 11th or 13th, or whenever it was, that you saw Dr. Stotz up here, you would miss a trip?

A. Yes, sir, I believe I did.

Q. And you missed, of course, your trips here in the proceedings in this lawsuit, is that right?

A. Yes.

102 Q. Now, from December 9th or 10th of 1952, until November 4, 1954, you had not tried, had you, at that time you had not even tried to take your old job on the local freight?

A. No, sir.

Q. And then in the latter part of December, 1954, you took your old job, did you not, for about a week?

A. When?

Q. In about the latter part of December of 1954.

A. No, sir.

Q. You did not?

A. No, sir.

Q. You have not done any work at all then on your old East St. Louis-Clinton run?

A. Just as a conductor.

Q. You have never tried to do it as a brakeman?

A. No, sir.

Q. And on the through freight run that you spoke about, how many days a week did you work?

A. Well, that would be according to how many times you got called out, how many days it would be. You count so many trips.

Q. The work has been pretty regular on the through freight?

103 A. At times. And at times it is working pretty good, and at other times you don't go so often. Sometimes you get four trips in every two weeks, sometimes you get six.

Q. And you find it often, do you not, that you work even seven days a week?

A. No.

Q. No?

A. No, sir.

Q. Did you ever work seven days a week?

A. Yes — well, seven day a week — yes; in through freight, yes.

Q. And that is the job that you are on at the present?

A. Yes, sir. That would be where you work every day.

Q. Now, at any time that you feel in the future, any time that you feel that you want to take your old job, it is open to you, is it not?

A. Yes, sir, as long as my seniority entitles me to hold the job.

Q. Well, your seniority entitles you to hold the job at the present, doesn't it?

A. Yes.

Q. The moment you return to Clinton you can bid on that job, can't you, on your old job?

104 A. Yes, if there is nobody older in seniority than I am on it, I can.

Q. Since you returned to work in December, 1952, have you taken any passenger jobs?

A. Yes, I worked the passenger when they called me for it. You see, in my layover at Clinton, after the expiration of eight hours, I am subject to a call as brakeman on my job, a passenger flagman, a passenger baggage man, or a conductor, extra conductor.

Q. As those jobs come up, you can either take them or leave them?

A. If my seniority entitles me to, I can take them or leave them.

Q. Now, isn't it a fact, Mr. Webb, that on the local freight as compared to the through freight job, you have more out-of-pocket expenses on the local freight work?

A. Yes.

Q. Do you have any idea about how much a month that would be?

A. No, I would not. I would say it costs you about at least a dollar to a dollar and a half more per trip.

Q. That would offset to some extent, would it not, 105 the overtime you would be able to make on the local freight, isn't that correct, to that extent at least?

A. A little, yes.

Q. Now, these figures that are shown here on Plaintiff's Exhibit 1 for identification, where did they come from, Mr. Webb?

A. Well, sir, I got those from the secretary of the lodge I believe, Lodge 41.

Q. The secretary of the lodge of your brotherhood?

A. Yes, sir, Clinton, Illinois Lodge 41. I believe I got this stuff from him.

Q. You believe, or you know?

A. Now, I believe he is the one that furnished me that.

The Court: That is where they came from anyway, is that right?

The Witness: Yes, it came from the Brotherhood of Railway Trainmen records.

By Mr. Bunn:

Q. And those are not railroad records, are they?

A. Oh, no, sir.

Q. According to that record, there is about, roughly, 50 cents a day difference per hundred miles on the local as against the work you are doing, is that right?

A. About 46 cents, I believe.

106 Mr. Bunn: I don't know whether these are correct or not. At present I have no way of verifying them. I do not have anything like this in my file, myself.

The Court: I will reserve my ruling on it until you have a chance to check it.

Mr. Bunn: All right, thank you, Judge.

By Mr. Bunn:

Q. The pay that you make, Mr. Webb, is going to depend a lot on whether you stay on any certain run or not, is it not?

A. Yes, it would depend on that; also how often I work.

Q. That is right. At the time of the accident you were working on the local freight?

A. Yes, sir.

Q. But in the past you had taken for a while other runs, had you not?

A. Yes, sir.

Q. And since that you have taken other runs, have you not?

A. Yes. I have taken chain gang, and I was on this Mt. Pulaski local.

Q. And passenger?

107 A. I went out when they called me. I did not have enough seniority to take a passenger, but I went when they called me for it.

Q. And you have taken every job but the one that you were on at the time you were hurt, is that right?

A. Yes, sir. In one sense of the word, I did not take this Mt. Pulaski local. I marked up in another man's temporary vacancy.

Q. Well, that was your choice, wasn't it? You did not have to take it, did you?

A. Oh, no, I did not have to take it.

Q. That was your choice, to take it?

A. Yes, sir.

Q. Now, speaking of July 2, 1952, the weather was clear that day, was it not, at least about 10:45 or 11:00 o'clock?

A. Practically clear, I would say, yes.

Q. And shortly thereafter it was raining, I think?

A. I judge maybe thirty minutes to an hour afterwards it rained.

Q. And about how long had you worked on and off on this East St. Louis-Clinton run prior to July of 1952?

A. Since I hired out as a brakeman in 1935.

Q. That was about seventeen years?

A. Yes, sir.

Q. That runs from East St. Louis to Clinton and return?

A. It does now, but in former years it did not. It used to tie up at Springfield.

Q. Now, in that length of track that you would go back and forth over prior to 1952, what type of ballast would you find making up the roadbed?

A. In the seventeen years that I was — since I started braking?

Q. Yes, sir.

A. Well, you could run onto most any kind of a roadbed. It would be cinders, it could be chat.

Q. Chat is crushed stone, is that right?

A. There is real fine crushed stone, and there would be strips of tracks that would have rock ballast, maybe a half inch to an inch in size, some ballast that would have run bigger than that.

Q. And for about how long prior to July of 1952 had you been making stops on the local freight run that you were on at that time, how long had you been making stops at the Mt. Olive house track switch to make pickups from the house track?

A. Practically every day that I was on the local — 109 no. Lots of days we did not pick up from the house track.

Q. About how often would you pick up cars from the house track?

A. Well, at that time we was hauling way freight and in box cars. That is local way freight they unloaded at different stations. Most of the time we had set this car out at Mt. Olive.

Q. You would leave the car there?

A. Leave it there, and let the agent and the truck man unload it from the house track. On days that we had this car, we would leave it there; and maybe if we did not have one, the opposite local dropped one there, then we would go in and pick it up and take it to Litchfield, Illinois. Maybe if it would be empty, we would take it on and use it for something else.

Q. Would it be a fair statement to make, then, that practically every day you did pass over the house track switch?

A. Yes, if we had work to do there, we had to pass over the house track switch.

Q. Well, you had work there almost every day, didn't you, Mr. Webb?

A. Yes, practically every day, I would say, we 110 picked off cars off the L & N and delivered cars to the L & N and we went in and out of the siding and any time you went into the siding, you had to pass the house track switch.

Q. And it was one of your duties to throw the house track switch, was it?

A. If I was in position to throw it, yes, when we was using the house track switch, yes?

Q. Well, you were familiar with the footing conditions, were you, around the house track switch at Mt. Olive?

A. Yes.

Q. And there were no depressions to speak of, were there?

A. I never noticed any.

Q. And the ground was fairly level, was it not?

A. Yes, sir.

Q. In fact, the picture here substantially represents the conditions/as they existed, does it not?

A. Yes, it does. It is the same locality, it looks to me like.

Q. Now, Mr. Webb, in the photograph here the photographer was looking north, was he not, generally north?

A. Yes, in a general direction, yes.

111 Q. And this is the house track switch, is it not?

A. Yes, sir.

Q. And at the time of the occurrence in question you were, I think you said, about 15 or 20 feet south of the house track switch, is that right?

A. Yes.

Q. And at the point that you slipped, about how far east — east is looking in this direction, is it not?

A. Yes.

Q. About how far east of the ties were you at that point?

A. About a foot east.

Q. Will you just take this pen and mark an X approximately where you were?

(Witness marks photograph.)

Q. Now, in all of the years prior to July 2nd of 1952 that you have been working in that area, you had never noticed any large clinkers there, had you?

A. Right at the spot that I was standing, you mean?

Q. Well, in that area.

A. Yes, that area, in that area.

Q. You had noticed them?

A. Yes.

Q. What did you do when you found them?

A. I did not do anything, sir. They was out of the 112 way so I would not walk on them.

Q. If you saw them, would you pick them up and throw them outside?

A. Once in a while. It was the only place there for the fireman to clean his fire box there at Mr. Olive, and I have seen clinkers laying around different places.

Q. Now, let me see if I get this correctly from you. You say — correct me if I am wrong — that on your trips prior to July 2, 1952, you say you did notice large cinders near the house track switch?

A. How long before did you say?

Q. Prior to July 2, 1952.

A. Yes.

Mr. Rafferty: What page?

Mr. Bunn: 26.

By Mr. Bunn:

Q. Calling your attention to on or about November 4, 1954, do you recall coming up here to Chicago, and that is the first time we met? Is that correct?

A. Yes.

Q. We met in Mr. Rafferty's office, is that correct?

A. Yes.

Q. At that time you were placed on your oath and 113 asked certain questions, and you gave certain answers, is that correct?

A. Yes, sir.

Q. There was a reporter there that was taking down everything that you said in answer to the questions, is that correct?

A. Yes, sir.

Q. Well, now, do you recall, Mr. Webb, this question being asked and this answer being given:

"Q. Had you at any time on previous trips prior to July 2, 1952, ever noticed large cinders there near the house track switch?"

"A. No, sir."

Do you recall that?

A. Yes, sir.

Q. That answer given?

A. Yes.

Q. Do you recall making that answer?

A. Yes, sir.

Q. Now, the day of July 2, 1952, the day of the occurrence that we have here, you never noticed, did you, Mr. Webb, any other large clinkers in the area other than the one that you have told us that you stepped on?
114 Is that correct, sir?

A. No, sir. The footing looked level.

Q. Now, you did not get my question, Mr. Webb. On July 2, 1952, in the house track switch area, you did not notice any other large clinkers in the area other than the one that you have told us that you stepped on, isn't that correct?

A. Yes, sir.

Q. I think you testified already you had looked at the ground as you made that first step. Is that right, sir?

A. Yes, sir.

Q. And you saw nothing?

A. No, sir.

Q. You saw no large cinder?

A. No, sir.

Q. You don't know whether it was slightly out of the ground or whether it was buried completely in the ground, or exactly how?

A. It must have been completely buried, covered over.

Q. You did not see it, Mr. Webb?

The Court: He said no.

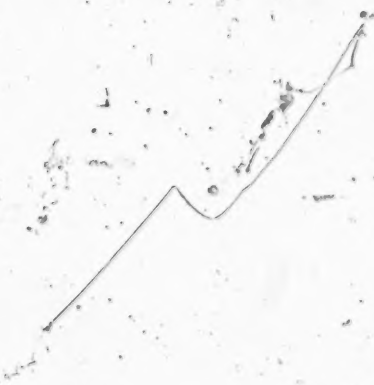
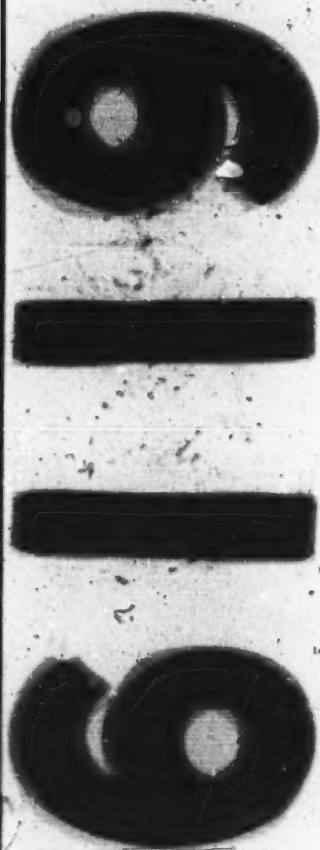
A. I did not see it.

By Mr. Bunn:

Q. So, when you say it must have been, that is more or less a guess; you don't actually know?

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115 A. Yes, I know.

The Court: It is self-evident he does not know, if he did not see it.

Mr. Bunn: I see, your Honor.

By Mr. Bunn:

Q. Now, this cinder that you speak of you did not see until after you fell, is that correct, sir?

A. No, sir.

Q. And when you fell, you naturally kicked up a little of the cinders around there, didn't you?

A. Yes, sir.

Q. Did you fall on your back or on your stomach?

A. I fell straight down on my leg, with my leg doubled over. I went in a down position.

Q. And then when you looked around, you saw this cinder, is that correct, sir?

A. Yes.

Q. And at that time it was just barely discernible, was it not?

A. No, sir. It was partially kicked out of the cinders, and there was a hole there by the side of it.

Q. How much of it would you say was visible?

A. Well, that would be hard for me to answer. I 116 would say two-thirds of it.

Q. Well, at the same time, Mr. Webb, back on November 4, 1954, when you made this sworn statement, do you recall the following questions being asked and the following answers given:

"Q. After you had fallen to the ground?

"A. After I had fallen to the ground I looked to see what I stepped on, sir, and it was this cinder.

"Q. And at that time how far was it protruding out of the ground?

"A. I don't know. It was sticking up a little out of the ground. I guess I kind of threw it out when I turned my foot. I would not know how far it was sticking out. It was just discernible."

Do you recall making those answers to those questions?

A. Yes, sir.

Mr. Rafferty: Object. There is no impeachment in that.

The Court: Without ruling whether it is impeaching or not, the answer may stand.

Q: You have already stated this cinder you threw away, is that right, sir?

A. Yes.

117 Q: Did you show it to any of the crew before you threw it away?

A. No, sir. There was no one standing close in the vicinity of it at the time I threw it away.

Mr. Bunn: I would like to make a stipulation at this time, to more or less make this in some sort of continuity, if I may make a stipulation to the effect that no man in the crew that accompanied Mr. Webb actually saw Mr. Webb fall, but the fireman, I believe it was, did notice him rubbing his knee.

The Court: Is that right?

Mr. Rafferty: That is correct.

The Court: Stipulated. Anything further with this witness?

Mr. Bunn: Yes, just a few more questions, your Honor.

The Court: All right.

By Mr. Bunn:

Q: Now, that cinder you stated you had never seen there before, although you were over there most every day?

The Court: That is what he said.

By Mr. Bunn:

Q: Now, Mr. Webb, you don't know when that 118 cinder was placed there, do you?

A. No, sir.

Q: You don't know who placed it there, do you?

A. No, sir.

Q: It is conceivable that cinders of that sort may have been placed there in a multitude of ways, isn't it, Mr. Webb?

Mr. Rafferty: Objected to, calling for a speculation.

The Court: Sustained.

By Mr. Bunn:

Q: Now, Mr. Webb, the operation of the train itself did not in any way cause you to slip and fall, did it?

A. No, sir.

Q: The box cars you were alongside of, they were standing still?

A. Yes.

Q. You were not touching any portion of them?

A. No, sir.

Q. And as far as the treatment at the Illinois Central Hospital is concerned, you received very satisfactory treatment, did you not?

A. Yes, sir.

119 Q. You made that statement, did you not, earlier?

A. Yes, sir.

Q. And you came up to Chicago, I think, to the hospital again about November 10, 1952, is that right?

A. Yes, sir.

Q. And you were discharged from the hospital at that time, is that correct?

A. I came up here I believe it was November 8th, and I was discharged to be effective November 10th.

Q. November 10th?

A. Yes.

Q. Were you told at that time that you could proceed to work?

A. I was released for work, yes, sir.

Q. And you remained up here, and on the same day, or the following day, you went over to see Dr. Stotz, is that right?

A. Yes, sir.

Q. He did not treat you in any way, did he?

A. No.

Q. He told you, he recommended another thirty days off, is that right?

A. He took X-rays of my leg, and then he recommended I take thirty days rest period.

120 Q. That knee has never locked on you, has it?

A. No, sir, not exactly.

Q. You spoke of aspirating the knee. That is what was done at the hospital, is that right?

A. After the operation, I think about five days, they aspirated the knee.

Q. Would you take that piece of paper, and show me where the circumference of that circle is?

A. The circumference is this (indicating).

Q. Thank you. I want you to show me a six-inch circumference, using this tape measure. Just make a circle, six inches in circumference.

Mr. Rafferty: I think it is self-evident what six inches is.

By Mr. Bunn:

Q. That would be it roughly, wouldn't it (indicating)?

A. That would be the circumference, yes, sir.

Q. And do you know what the circumference of your fist is?

A. No, sir, I don't.

Q. Now, Mr. Webb, on August 7, 1952, a claim agent for the Illinois Central came out to see you to take your statement, did he not?

A. No, sir.

121 Q. He did not?

A. No, sir.

Q. Did you come to see him?

A. I went to see him.

Q. You have a copy of that statement, don't you?

A. Yes, sir.

Q. And it is signed by you, isn't it?

A. Yes.

Q. I show you this statement and ask you whether or not that is your signature on it?

A. Yes, sir.

Q. And it was signed on or about the date it purports to bear?

A. Yes, sir.

Q. And it states in it, does it not, just above your signature:

"I have read the foregoing and it is correct"?

Is that right, sir?

A. Yes, sir.

Q. And do you recall whether the statement had in it:

"The cinders were stirred up and loose, and this large cinder, about six inches in circumference, was buried
122 in the loose cinders around it"?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. And you recall about the size of six inches in circumference being roughly that?

A. Yes, sir.

Mr. Bunn: I think that is all, Mr. Webb.

The Court: Anything further?

Mr. Rafferty: Yes.

Redirect Examination by Mr. Rafferty:

Q. Mr. Bunn referred to a statement that you gave to the claim agent on or about August 7, 1952. I wonder if you would tell the Court and jury whether this statement is included in the statement to the claim agent:

"As I started to walk to the caboose to get some waste to plug the hole with, I took one step and stepped on a cinder buried in the loose cinders. It threw me off balance and caused me to fall and I injured my left knee as I fell.

This happened about 15 feet south of the house track 123 switch, on the east side of the house track. This track had been worked on shortly before this by the track men and the cinders were strewed on loose, and this large cinder, about six inches in circumference, was buried in the loose cinders around it, so it was not discernible from the rest of the small loose cinders. It looked like the surface was level. But this cinder caused my foot to turn as I stepped on it, causing me to fall so I injured the cartilage in my knee when I fell. It pained me severely"

Mr. Bunn: Your Honor, I think this is nothing but a self-serving declaration.

The Court: Do you intend to introduce it?

Mr. Rafferty: I would be satisfied to have the whole statement introduced.

Mr. Bunn: I don't object to the introduction of it.

The Court: All right. It may go in without further reading.

Mr. Rafferty: May we have it identified for the record, as Plaintiff's Exhibit 2?

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 2.)

By Mr. Rafferty:

Q. At the scene of the accident, did you have any tape measure to measure this cinder?

A. No, sir.

Q. Did the claim agent bring any tape measure with him to demonstrate to you what a circumference of six inches might be?

A. No, sir.

Q. At the time you talked to the claim agent, did you make any reference to the cinder as being approximately the size of your fist?

A. Yes, sir.

Q. Mr. Bunn inquired as to whether or not you had done any work in the passenger service since the time of the accident. Can you tell the Court and jury approximately how many days since December 1952 you have had an opportunity to work on the passenger service either as flagman, brakeman or baggage man, how many chances have you had?

A. Since when?

Q. Since you went back to work in December 1952 how many opportunities have you had to work in passenger service?

A. Very few.

Q. Could you give us a rough estimate of how many?

A. Well, I would say not over six or eight times.

Q. Now, from the standpoint of conductor's work being available to you, do you know how many men from the standpoint of seniority have prior right to the conductor's job over you; how many men are ahead of you that can take the conductor's work before you have a chance?

A. That has not got conductor's jobs at the present time?

Q. Yes, who are not working as conductors, who have greater rights than you have to that conductor's job?

A. About six or seven, I would say at the present time. I don't know just exactly who holds the youngest job as conductor.

Q. Mr. Webb, will you tell the Court and jury the difference between the amount of work available in through freight or regular freight service as opposed to local freight service, the job you are holding down now?

A. I don't understand the question?

Q. Well, is the work week longer in a regular freight service, the average work week?

A. No, sir.

Q. How about local freight?

A. That was six days a week, every week.

Q. And what about overtime on the local freight work?

A. We got a lot of overtime on it practically every day.

Q. When does overtime start in railroading?

A. Well, on the northbound train it starts at eleven hours and fifty-five minutes.

Q. And what about trains going in the opposite direction?

A. Southbound trains your overtime starts at the expiration of twelve hours and nineteen minutes.

Q. And have you stated that overtime work was the regular thing in that type of service?

A. In local service, yes.

Q. For what reason, then, are you holding the job in through freight or regular service rather than local freight service?

A. It is an easier job, shorter hours, less work.

The Court: I think you have covered that.

By Mr. Rafferty:

Q. Does the Illinois Central Railroad have a compulsory retirement age for brakemen or switchmen or 127 conductors?

A. No, sir.

Q. Mr. Bunn referred to the fact that you missed no work in December of 1952 after returning to work from your hospital stay and convalescence. Is that the same period of time you testified earlier that the other members of the crew were doing the heavier work?

A. Yes, sir.

Q. Mr. Webb, I believe you stated that certain repair work had been done near the house track switch before this accident happened. Had you received any orders or instructions prior to that time with reference to working at this particular end of the track as opposed to the other end?

A. Yes.

Q. What were the instructions?

A. The instructions were that the south end of the passing track could not be used on account of the section men working. Sometimes the orders would tell us why and sometimes they would not.

Q. How many trips did you make to this scene of the accident after receiving notice that repairs were being made thereon, I mean, just before this accident happened?

A. I don't recall. I just don't understand your 128 question.

Q. On any type of service I understand you had been told not to use that particular end of the track.

A. Yes.

Q. Then apparently you got instructions you could use it. Approximately how many times after you got instructions that you could use it did you go into the track there before this accident happened?

A. I don't know if we went on that portion of the track or not, but I passed through there.

The Court: You don't know — is that your answer?

The Witness: Yes, sir.

The Court: All right. Anything further?

Mr. Rafferty: I believe that is all with this witness.

The Court: Anything further?

Mr. Bunn: Just a couple of questions, your Honor.

Recross Examination by Mr. Bunn:

Q. This repair work that was done, do you know approximately when it was done, Mr. Webb?

129 A. It was in the month of June, I believe.

Q. About the middle or latter half or first half?

A. Well, I would not know. It was during the month. I don't know exactly if it was the first part or the middle or all month, but there were different days that we had this order that Mr. Rafferty referred to not to use the track. Maybe we would go through there a couple of days, you know, that we would not get this order.

Q. But this work was all completed when you made your trip July 2nd, was it not?

A. As far as I know, yes.

Q. And during the year of 1954, Mr. Webb, you have taken over the conductor's job, have you not, on the local and on the through freight quite often?

A. When my seniority entitled me to, yes.

Q. Even though there are five or six others ahead of you at the present?

A. If I am available at my home terminal, these five or six men that are ahead of me may be some place else; they may be at the other end of the road, and that would give me, entitle me to the first call.

Mr. Bunn: I think that is all your Honor,

130 The Court: Is that all?

Mr. Rafferty: That is all.

Mr. Rafferty: At this time I would like to read
131 into the record the life expectancy of Mr. Webb.

Ladies and gentleman, according to the American Experience Table of Mortality, the life expectancy of a man 48 years of age, which is Mr. Webb's present age, is 22.36 years.

Your Honor, subject to the Court's ruling on the admission of Plaintiff's Exhibit 1 for identification, the pay scale, plaintiff rests.

The Court: The jury may recess until 2:00 o'clock. (Whereupon the following proceedings were had out of the presence and hearing of the jury:)

The Court: Whatever motion you have to make, I will take it under advisement until further order of the Court.

Mr. Bunn: To whom shall I submit them, to the Clerk?

The Court: Yes, or hand them to me now.

Mr. Bunn: I have motions at the close of plaintiff's case.

The Court: You have them?

Mr. Bunn: I have them with me, yes, sir.

The Court: And your suggested instructions, bring them in at 2:00 o'clock. You number yours, and you letter yours. Have a copy available for each other.

Mr. Rafferty: I letter mine, and Mr. Bunn numbers his?

132 The Court: Yes.

(Whereupon a recess was taken to 2:00 o'clock p.m. of the same day, February 21, 1955.)

* * (Caption No. 53 C 1687) * *

133 Before Judge Sullivan and a Jury, Monday, February 21, 1955, 2:00 o'clock p.m.

Court met pursuant to a recess.

Present:

Mr. Robert J. Rafferty,

Appeared on behalf of the Plaintiff;

Mr. William F. Bunn,

Appeared on behalf of the Defendant.

Thereupon the Defendant, to maintain the issues on its part, offered the following evidence.

LESTER RECTOR, called as a witness on the part of the Defendant, being first duly sworn, testified
134 as follows:

The Court: What is your name?

The Witness: Lester Rector.

The Court: Where do you live?

The Witness: Litchfield, Illinois.

The Court: What is your business?

The Witness: Track inspector.

The Court: What road?

The Witness: Illinois Central.

The Court: All right. Go ahead.

Direct Examination by Mr. Bunn:

Q. How long have you been employed by the Illinois Central?

A. 34 years.

Q. Calling your attention to the month of July of 1952, what was your occupation?

A. Section foreman.

Q. And you were section foreman of what section?

A. Section DA-14, I believe it was.

Q. Now, Mr. Rector, will you speak up so all the ladies and gentleman of the jury and his Honor, the Judge,
135 can hear you? The section that you were the foreman of, did that have a name, or did you have a name for that section?

A. I beg your pardon, I did not get the question.

Q. Is there a name for the section you were working on?

A. South Litchfield.

Q. Does that section include the tracks, both main and passing at Mount Olive, Illinois?

A. Yes, sir.

Q. Prior to July of 1952, how long had you been section foreman for that section?

A. Oh, approximately 31 years. On that section? No. On that section about 15 years.

Q. Just tell the ladies and gentleman of the jury generally the nature of your duties as a section foreman.

A. Well, my duty as a section foreman was the general maintenance of eight miles on the main line and adjoining side tracks, which we had two, one at Litchfield and one at Mount Olive, and other tracks, house tracks we call them, or inside tracks. At Mount Olive we had a track, a house track, a lumber stub and mill track, as they were called. It was my duty to maintain those and keep
136 them in safe condition.

Q. Mr. Rector, did you have any men working under you?

A. Yes.

Q. How many men did you have?

A. Four.

Q. Did you have any equipment at your disposal?

A. Yes, sir. I had a motor car, push car, tamping machine, and other tools that were used in the maintenance of the track.

Q. And the tamping machine, what is it for?

A. An electric tamping machine for servicing purposes. When you raise tracks out of place, three, four or five inches, we have a program of two or three miles in one stretch, and we use a tamping machine to tamp the ties.

137 Q. Now, Mr. Rector, in July of 1952, and prior thereto, what was the nature or what was the type of material used on your section as ballast?

A. A chat ballast was used at that time.

Q. And chat is what?

A. It is small rock or crushed stone, very small.

Q. All right. The chat was on what line?

A. I beg your pardon?

Q. Did you say the chat was on a certain line?

A. It was on the main line and the side tracks at that time.

Q. Now, as far as any repairs to the roadbed or the shoulder in your section, who would be the man immediately in charge of those repairs?

A. It would be myself at that time.

Q. And who would actually do the repair work?

A. The supervisor directly over me would be the man that would instruct me to do the repairs.

Q. And the laborers on the job, who would they be?

A. They would be under me, under my jurisdiction.

Q. To the best of your knowledge, Mr. Rector, do you recall any repairs or resurfacing or re-tieing of the area located around the house track switch at Mount Olive, Illinois, prior to July of 1952?

138 A. Yes, sir.

Q. To the best of your knowledge, when was that work done prior to July of 1952?

A. In the latter part of March. I don't know the date.

Q. Now, did you make a record of the work done at that time?

A. I did have a record of it, but after I was transferred to the present job I have destroyed them. I did not figure I would ever need them again, and did not keep any records.

Q. To the best of your knowledge, was any work done around the area of the house track switch from the time that you mentioned in March, 1952, to July 2nd, 1952?

A. No, sir, there was not.

Q. Can you describe generally the work that was done around the house track switch in March of 1952?

A. Well, we gave this house track switch a raise of approximately five inches, tamped the ties up, and put the switch up in good condition, ran the surfacing back on the house track far enough to make it safe.

Q. Now, did you require the use of any additional ballast when you did that work?

A. Yes.

Q. And what was the material that was used for 139 the additional ballast?

A. We used chat and cinder mixture.

Q. And the chat and cinder mixture came from where?

A. It came from along the passing track just north of this house track switch. We had some surplus there that we had not used in re-laying the passing track, and we gathered that up, and trucked it in to this location, and used that for ballasting the surface on.

Q. This ballast then was the same type of ballast that was being used on the passing track?

A. Yes, sir, the same ballast.

Q. And do you recall approximately how long it took you and your men to do that job?

A. About two days to complete the job.

Q. And would you have any idea of approximately how much ballast was required to be trucked in?

A. Oh, fifteen yards, approximately that.

Q. Fifteen what?

A. Yards.

Q. Now, when this additional ballast was being trucked in, were you personally there on the job?

A. Yes, sir.

Q. And did you personally inspect the ballast being brought in?

140 A. I did, yes, sir.

Q. Now, to the best of your ability, can you indicate about the size of the cinders and the ballast that was trucked in?

A. The cinders was pretty clean along with this chat that we gathered up. I would say two inches in diameter would be about the largest. Of course, I have no way of knowing exactly, but about.

Q. Well, now, is any particular use made of larger cinders, if any are found?

A. We never use them if we can avoid it, of course. The larger cinders we take and either bury them or haul them away and dump them in a hole someplace, and dispose of them that way.

Q. Are the larger cinders ever used in raising the track?

A. No, sir.

Q. Following the completion of the work done around the house track switch in March of 1952, did you have occasion to personally inspect the work that had been done?

A. Yes, sir.

Q. And prior to the work being done there in March of 1952, did you have occasion in the past as section foreman to instruct the men under you as to what
141 should be done with any large cinders found or seen?

A. Yes.

Mr. Rafferty: Object to any instructions or conversation with the witness as not material.

The Court: Yes. You may locate the time and place.

By Mr. Bunn:

Q. Who were the men working under you during that time, Mr. Rector?

A. I don't remember all of them. One man that died, in particular, Harry Wolfe; Bill Young; Harold Boland.

The Court: That is not the question. Who gave the instructions.

Mr. Bunn: Mr. Rector did.

The Court: To these people he has mentioned?

Mr. Bunn: Mr. Rector did. He gave the instructions.

By the Witness:

A. (Continuing) That is all I can recall at the present time. There were two or three more, but I cannot call their names right at the present time.

By Mr. Bunn:

Q. Would you conduct safety meetings for the men 142 under you?

A. Yes. We had a safety calendar, we had a number of safety rules to read every morning, and we made a habit of doing that.

Q. During the course of these meetings that you conducted, did you ever have occasion to discuss the question of clinkers?

A. Yes. That was one of our regular discussions, especially on side track work, when we would go on side track work, to dispose of those.

Q. Now, Mr. Rector, back in July of 1952, how often would you have an occasion to be down around the Mount Olive house track switch?

A. You mean after this work was done, or after July? I did not get your question.

Q. I say, during the year of 1952, how often would you have occasion to be down around the Mount Olive house track switch?

A. Well, if I had no work there, twice a week, I would average twice a week down there to inspect the track and switch.

Q. What would your inspection entail; what would you inspect for?

A. Inspect for bad footing, any objects that might 143 be laying around, condition of our switches and tracks in general.

Q. Well, now, after the work was completed around the house track switch in March of 1952, did you have any knowledge as to whether or not any of the train crew or other employees of the Illinois Central Railroad ever complained to you about the footing conditions there?

A. No, they did not.

Q. Now, approximately how many times had you repaired or re-tied or resurfaced track during your 33 or 34 years with the railroad?

A. Well, that was the regular job. I would say every year, different amounts every year.

Q. I mean once a year, or more times a year, or what?

A. Sometimes maybe we would have two or three schedules there in the summer months. We would surface maybe a mile one spot, and wait a couple of weeks or a month, and surface another spot someplace.

Q. Mr. Rector, based upon your experience in re-tieing, resurfacing or reballasting the track along the right-of-way of the Illinois Central, did you feel on the completion of that job, March, 1952, that that job was done in a workmanlike manner and did afford good and sufficient footing for the trainmen?

144 A. Yes, that is right.

Mr. Rafferty: Object to that, your Honor.

The Court: Sustained.

Cross Examination by Mr. Rafferty:

Q. Mr. Rector, I believe you stated your territory included about eight miles of mainline track?

A. Yes.

Q. And certain house tracks and side tracks were also under your jurisdiction?

A. Yes, sir.

Q. About how great an area would that be, another mile or two of that type of track?

A. I did not get the question, sir.

Q. About how much length would be involved in these various side tracks that you serviced in addition to the main line tracks?

A. You mean the length of the side tracks?

Q. Yes.

A. Approximately one mile.

Q. In other words, you would have a distance of approximately nine miles, and yourself and four laborers working under you would take care of that amount of track?

145 A. We had two section gangs doubling together on this one particular job we were just talking about.

Q. The Mount Olive job?

A. The Mount Olive job, we had two section gangs working together.

Q. I believe you stated that your records as to the time of these repairs had been destroyed?

A. The time of the repairs?

Q. Your records covering this particular period had been destroyed?

A. I did not hear you, sir.

Q. Do you have in your possession any record that shows that the repairs on the Mount Olive house track were made in March of 1952?

A. No, sir. I have no records; I destroyed them.

Q. Would anybody else have any records showing the time the repairs were made that you know of, Mr. Rec-tor?

A. Not that I know of.

Q. When did you first know that there had been an accident involving Mr. John Webb?

A. It was in October following the work that I did there in March.

Q. In October of 1952?

A. In October, yes, sir.

146 Q. At that time did you have the records in your possession showing the date the repairs were made on the house track?

A. Yes, I did.

Q. Have you destroyed the records since that time?

A. Yes. I changed jobs was the reason for it.

Q. Are you a section foreman now?

A. No.

Q. What are you now?

A. Track inspector.

Q. As track inspector do you cover the same area of territory as you had as section foreman?

A. No, sir.

Q. Do you have any part of the same territory?

A. No, sir.

Q. I believe you stated, Mr. Rector, that approximately 15 yards of ballast were used in repairing the house track.

A. Approximately.

Q. You mean by that cubic yards?

A. Yes, sir.

Q. I understand you inspected this ballast.

A. Yes. We load it by hand on the push cars and in that way we could watch the loading of it. I did watch
147 the loading of it.

Q. Were you there watching four different men load shovel by shovel?

A. Sure. It was right there. They were loading from both sides and I saw every shovelful.

Q. And you never saw large clinkers in that mixture at all?

A. No, sir.

Q. Did you screen the ballast or do anything to separate large particles from small ones?

A. Yes.

Q. Was this ballast screened that was used in the house track at Mount Olive?

A. It was a clean ballast, with good mixture.

Q. I asked you whether this ballast was screened.

A. Screened?

Q. Screened.

A. No, sir. I did not get the question.

Q. I believe you stated, Mr. Rector, that you would not use a large clinker in the ballast near a switch stand, is that right?

A. That is right, I would not.

Q. Would you use ballast with clinkers the size of a man's fist?

148 A. No, sir.

Q. That would not belong in the roadbed near a switch stand, would it, Mr. Rector?

A. No, sir.

Q. I believe you stated, Mr. Rector, this job took about two days?

A. Yes, sir.

Q. Did you spend all your time on that job, or were you working at some second place in the territory?

A. Right there on that job, sir.

Mr. Rafferty: That is all.

Mr. Bunn: That is all.

(Witness excused.)

ED OELRICHS, called as a witness on the part of the Defendant, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: Ed Oelrichs.

The Court: Where do you live, Mr. Oelrichs?

The Witness: Mount Olive, Illinois.

The Court: Mount Olive?

The Witness: Yes.

The Court: What do you do?

149 The Witness: Track inspector.

The Court: For what road?

The Witness: Illinois Central.

The Court: How long have you been with the Illinois Central?

The Witness: Twenty-eight years.

The Court: Go ahead, Mr. Bunn.

Direct Examination by Mr. Bunn:

Q. Mr. Oelrichs, in your capacity of track inspector, how long have you held that job?

A. It will be ten years the 1st of May.

Q. And you are track inspector of what territory?

A. From Litchfield to Glen Carbon.

Q. And does that include the Mount Olive track?

A. Yes, sir.

Q. Can you tell us generally the nature of the duties of a track inspector?

A. A track inspector is to go over his territory and see that everything is in safe condition.

Q. Mr. Oelrichs, you work under whom? Who is your immediate superior?

A. John F. Brosnahan.

Q. Do you have any equipment that you work with?

150 A. Yes. I have a motor car and proper tools, wrenches, track bolts, scoop, level board and gauge.

Q. And during the year of 1952, how often would you have occasion to travel on the main line past the Mount Olive house track switch?

A. Five days a week.

Q. And during that same period, about how often would you have occasion to travel over the house track switch at Mount Olive?

A. Oh, once or twice a week; sometimes oftener.

Q. And in passing over the Mount Olive house track switch, are you governed at all as far as speed is concerned of the motor car?

A. I don't quite understand the question.

Q. Do you maintain any regular speed over the house track switch or don't you?

A. Yes, sir.

Q. About what speed do you go over the house track switch?

A. About three to five miles per hour.

Q. And is it part of your duty to inspect the tracks?

A. Yes.

Q. The ties?

A. Yes, sir.

151 Q. The roadbed?

A. Yes, sir.

Q. And the shoulder?

A. Yes, sir.

Q. And if you find anything you feel needs rectifying, what do you do, if anything?

A. Correct it.

Q. If you don't have equipment to correct it, what do you do?

A. Notify the proper authority.

Q. And in this case, who would that be?

A. The section foreman.

Q. Now, Mr. Oelrichs, to your own knowledge did any man of the Illinois Central Railroad ever complain to

you about footing conditions around the house track switch at Mount Olive, Illinois, in 1952?

A. No, sir.

Q. Or prior to that?

A. No, sir.

Mr. Bunn: That is all.

Cross Examination by Mr. Rafferty;

Q. What is the territory that you cover as track inspector?

152 A. Litchfield to Glen Carbon, Illinois.

Q. How many miles is that?

A. Forty and one-quarter, one way. You go that round trip.

The Court: Twenty miles one way?

The Witness: No, forty and one-quarter one way. It is eighty and one-half the round trip.

By Mr. Rafferty:

Q. Did you make that trip every day?

A. Five days a week.

Q. Each day for five days a week you make that trip?

A. Yes. Days of rest on Thursday and Friday.

Q. Does that give you much opportunity to inspect the ballast alongside the shoulder of the road?

A. Yes, sir.

Q. At what speed do you go over the house track switch at Mount Olive, Illinois?

A. About three to five miles an hour.

Q. Does that give you an opportunity to inspect the ballast alongside the roadbed?

A. Yes.

Q. Could you or could any person in your employment or doing your type of work see a large clinker the size of a man's fist imbedded in soft cinders, that was below
153 the surface?

A. Please repeat the question.

Q. Could either you or any person doing your work observe a large clinker, the size of a man's fist, imbedded below the surface in a roadbed?

A. It would be pretty hard to see.

Q. It would be impossible, wouldn't it?

A. Well, I would not say impossible.

Q. Do you believe you could do it, Mr. Oelrichs?

A. Did you say imbedded?

Q. That is right.

A. Well, if I was walking along I probably could see it.

Q. Did you make it a practice to make a walking inspection of the shoulder along the right-of-way of the forty and one-quarter odd miles of track that you covered as track inspector?

A. No, sir.

Q. Did you make it a practice to make a walking inspection of the roadbed alongside the house track switch at Mount Olive, Illinois?

A. At times, yes, sir.

Q. When was the last time you remember of an inspection preceding July 2, 1952, a walking inspection?

154 A. Well, I would not recall the exact date, but I have several switches there, and at times I pull off at the road crossing just south of the house track, and walk up to the switch along the roadbed.

Q. You don't know the last time you did that preceding July 2, 1952?

A. No, sir.

Q. Do you know how frequently you did that after repairs were made along that particular section of track?

A. Repeat that question, please.

Q. Let me ask you this: Do you know when the last time was that repairs were made adjacent to the house track switch before July 2nd, 1952?

A. Well, I think it was in March.

Q. Do you have any independent recollection of it being done in March?

A. Well, I just remember that they surfaced this track at that time.

Q. Do you have an independent recollection of it being done in March?

A. Well, the section foreman.

Q. Mr. Lester Rector is the one that told you it was done in March?

A. Well, I remember talking to him about it
155 when he surfaced this track.

Q. Do you remember talking to him about it the last few days?

A. No, sir.

Q. Did you come up with Mr. Rector to testify at this trial?

A. Yes, sir.

Q. And have you been over at the Claim Department of the Illinois Central Railroad talking about your testimony?

A. Yes, sir.

Q. And was Mr. Rector present then?

A. Yes, sir.

Q. Did Mr. Rector tell you that he had had certain records which showed the repairs were done in March of 1952?

A. I don't recall.

Q. Let me ask you this again, Mr. Oelrichs: Is your recollection of the repairs being made to this section of track in March of 1952 an independent recollection of your own, or do you base that upon some statement made by Mr. Rector or by somebody else?

A. Well, I did talk to Mr. Rector the other day when this case came up. That is the first I heard about this 156 case. I never knew anything about this case.

Q. Did Mr. Rector tell you then that he had made repairs to the track adjacent to the house track switch at Mount Olive, Illinois, in March of 1952?

A. Yes, he probably did.

Mr. Rafferty: That is all.

Mr. Bunn: That is all.

(Witness excused.)

JOHN J. BROSNAHAN, called as a witness on the part of the Defendant, being first duly sworn, testified as follows:

The Court: What is your name?

The Witness: John J. Brosnahan.

The Court: Where do you live?

The Witness: Springfield, Illinois.

The Court: What is your business?

The Witness: I am supervisor of track, Illinois Central.

The Court: How long?

The Witness: I have been supervisor of track thirteen years.

The Court: How long have you been with the Illinois Central?

157 The Witness: About twenty-six years.

The Court: Proceed.

Direct Examination by Mr. Burn:

Q. Mr. Brosnahan, your territory in the month of July, 1952, was what?

A. From Springfield to Glen Carbon.

Q. And does that territory include Mount Olive, Illinois?

A. Yes, sir.

Q. And as track supervisor, did you have, during that period, jurisdiction over the Illinois Central main track through Mount Olive?

A. Yes.

Q. How about the IC passing track?

A. Yes, sir.

Q. The house track switch and the house track at Mount Olive?

A. Yes, sir.

Q. How long from July of 1952 back, how long had you been track supervisor of this section?

A. I had been in that district for five years.

Q. Now, Mr. Brosnahan, can you just tell us generally the nature of the duties of a track supervisor?

158 A. A track supervisor has section gangs under his jurisdiction who maintain and construct the roadbeds, keep the tracks in alignment, and apply ties and ballast.

Q. And in 1952, how many section gangs did you have under your jurisdiction?

A. In 1952 I had twelve section gangs.

Q. And one of those section gangs included the South Litchfield section that Mr. Rector was the section foreman of, is that correct?

A. Yes.

Q. Each section gang has a section foreman, has it not?

A. Yes, sir.

Q. Now, what equipment do you have personally to work with, Mr. Brosnahan?

A. I go over my territory on an average of two or three times a week on a light inspection motor car.

Q. I see. And do you travel alone, or are you accompanied by anyone?

A. No. I have a man operate the car for me.

Q. Mr. Brosnahan, when there is any construction or maintenance work to be done on your section, how is it determined, who determines whether the work is to be done?

159 A. Well, I usually plan the work with the section foreman. He and I plan together. I arrange for the material, and the section gang does the work.

Q. And are any records kept of the work that is done?

A. We send a small daily card, that is, the foreman sends a small daily card in to the Clinton office, to the supervisor's office, at the end of each work day.

Q. And are those records available at this time?

A. No, sir, they are not. For one year they keep the records for comparison purposes, and after one year they are destroyed.

Q. I saw you down in Clinton Saturday, did I not?

A. Yes, sir.

Q. At that time did I ask you to get the records if they were available?

A. Yes, sir.

Q. And they are not available?

A. No, sir, they are not.

Q. Mr. Brosnahan, do you have any recollection of any construction or maintenance work done around the Mount Olive, Illinois, house track switch during the year of 1952?

A. I have no definite knowledge.

Q. Well, then, during the year of 1952 could you
160 tell us briefly what type of ballast was on the road-bed in your territory?

A. In 1952 we had a chat ballast, which is crushed stone, on the main track, and a combination of chat and cinders on the side tracks.

Q. Can you explain briefly to the ladies and gentlemen of the jury the purpose of ballast on a railroad road-bed?

A. The ballast is placed between the ties for holding the ties in alignment, holding the track in alignment, and to tamp under the ties to make the rails even.

Q. Now, this motor car that you described earlier, at about what speed would you travel along the main line?

A. About 15 to 20 miles per hour.

Q. And as far as the trips that you made, did you observe, or did you compile records, or what did you do on those trips?

A. Well, I observed the surface of the track, that is, the alignment of the rails, the general condition of the ballast, the general condition of the right-of-way, and contacted the section foremen about work.

Q. And during the year 1952, your capacity as track supervisor, how often would you pass Mount Olive, Illinois?

A. About once a week.

161 Q. And would you ever have occasion to go over to the Illinois Central house-track and over the Illinois Central house track switch?

A. I would say once every three weeks or four weeks I would pass over the siding and house track switch.

Q. Would you ever stop at the switch or at the siding?

A. Well, once in a while we would, I would stop; not on every trip, no.

Q. And the purpose of these trips onto the siding and switch would be what?

A. For inspection.

Q. You have already testified you would inspect the ballast also?

A. Yes, sir.

Q. On these trips over your territory, have you ever had occasion to notice any clinkers in the ballast?

A. Yes, sir.

Q. And if you find them, do you take any corrective measures?

A. Yes, sir, I would arrange for the section foreman to have them removed.

Q. And have you on your trips ever observed any clinkers or objects or anything foreign to the roadbed imbedded in the ballast?

162 A. Yes, sir.

Q. And did you do anything when you observed that?

A. Yes, sir. If it was in a place where men would be working or walking, I would have them removed, any place where there is bad footing.

Q. And during the year 1952, would you instruct your section foremen to the same effect?

A. Yes, sir.

Q. Now, Mr. Brosnahan, have you ever received any complaint about the footing conditions around the house track switch at Mount Olive, Illinois?

A. No, sir, I have not.

Q. That includes during the year of 1952?

A. Yes, sir.

Mr. Bunn: Your witness, Mr. Rafferty.

Cross Examination by Mr. Rafferty:

Q. I believe you stated, Mr. Brosnahan, that your territory was from Springfield, Illinois, to Glen Carbon?

A. Yes, sir, that is right.

Q. In terms of miles, how lengthy a territory is that?

A. That is a little over forty miles.

Q. I believe you stated that the records of your department which would show the date the repairs were made on the track adjacent to the house track switch at Mount Olive, Illinois, have been destroyed?

A. Yes, sir.

Q. When was the first time that any representative of the railroad Claim Department contacted you with reference to those records?

A. Last Saturday.

Q. If any representative of the Claim Department had communicated with you within one year after July of 1952, could you have saved the records to show when the repairs were made?

A. I beg your pardon. I did not understand that.

Q. If any representative of the railroad had communicated with you within one year after July 2, 1952, would you then have had records showing where repairs were made?

A. Yes.

Q. But no representative contacted you?

A. No, sir.

Q. I believe you stated the various purposes of ballast. Let me ask you, Mr. Brosnahan, if one of them is not to afford safe footing for trainmen whose duties require them to work in or about switch stands?

A. Yes, sir.

164 Q. In your opinion, Mr. Brosnahan, would the presence, if it existed, of a clinker the size of a man's fist, imbedded in the cinders, adjacent to a switch stand, represent a safe place for a trainman to work?

A. No, sir.

Mr. Rafferty: That is all.

Mr. Bunn: That is all.

(Witness excused.)

Mr. Bunn: If your Honor please, at this time I would like to make another two stipulations, with the consent of Mr. Rafferty.

Mark these Defendant's Exhibits 2, 3 and 4.

(Whereupon said documents were marked respectively Defendant's Exhibits 2, 3 and 4.)

Mr. Bunn: Defendant's Exhibits 2, 3, and 4 are bills from the Illinois Central Hospital, and the doctor, Chester C. Guy, who performed the operation on Mr. Webb, to show that they have been paid by the Illinois Central Railroad Company.

The Court: They may be admitted in evidence.

(Said documents, so offered and received in evidence, were marked, respectively, Defendant's Exhibits 2, 3 and 4.)

165 Mr. Bunn: Mr. Rafferty has also agreed that we may read in evidence the rule of the Illinois Central Hospital Department as follows:

"The company will pay all expenses of employees injured on duty and for the care of passengers or others injured on its right-of-way for which it may be obligated."

Mr. Rafferty and myself have also agreed to stipulate, your Honor, as to the statements that I read from this book, that if the Reporter who took the original statement were to come in and testify, he would testify that the questions I read and the answers I read were the questions asked of and answered by Mr. Webb on November 4, 1954.

Mr. Bunn: I think the defendant rests now, your Honor.

Mr. Rafferty: Plaintiff rests — the only question is with reference to Plaintiff's Exhibit 1. I think Mr. Bunn wanted to verify that before your Honor formally ruled on it.

Mr. Bunn: May we check on that at this time? May I suggest a five minute recess while we check this.

The Court: We may take a recess and take up the other matters after the jury goes out.

166 Mr. Bunn: I don't have our own book here. We don't think this is wrong. I think if Mr. Webb took this from their Brotherhood papers it is all right.

The Court: I will admit them, and in the meantime I am going to take up the other matters after the jury goes. You can check on it between now and the time we convene.

Mr. Rafferty: For the record, may I offer in evidence Plaintiff's Exhibit 1?

The Court: Yes, it may be received.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

The Court: Both sides rest?

Mr. Rafferty: Yes.

Mr. Bunn: Yes.

The Court: The jurors will remember their instructions. Tomorrow is one of the few holidays in the United States Courts, Washington's Birthday. So you may go until Wednesday morning, a little before 10:00. You may retire.

(Whereupon the jury retired from the court room, and the following proceedings were had out of the presence and hearing of the jury:)

167 The Court: Before we take up the instructions, have you the instructions at the close of the defendant's case?

Mr. Bunn: I instructed one of our secretaries to prepare them this morning. Apparently they have not brought them over yet.

The Court: I have not looked over them carefully. Are you making a separate one as to each one of the charges of negligence set out?

2

Mr. Bunn: Yes, each one of the charges of negligence, and an instruction as to the entire complaint.

The Court: Yes, I know. Have you looked over your charges of negligence?

Mr. Rafferty: Yes, your Honor. I would be satisfied to go to the jury on the sub-count (A), a safe place to work.

The Court: All right. I will tell you what to do. That will be an easy matter to dispose of. You withdraw the charges of negligence set out in B, C and D.

Mr. Rafferty: That is correct, in Paragraph 6 of the complaint.

The Court: That is right. So Mr. Rafferty is now asking for (a) alone to go to the jury. So that disposes of a good deal of the matter set up in your motions, Mr. Bunn.

168 Well, you don't attack (a) individually, that is, specifically; you attack it in your general motion.

Mr. Bunn: There is also one attacking it specifically as to Paragraph 6 (a) of the complaint.

The Court: Yes, here it is. Well, as to 6(a), your motion to instruct the jury to find the defendant not guilty will be denied; and likewise as to your general instruction, that will be denied, at the close of plaintiff's evidence; and that will be the same ruling on your other motions. (b), (c) and (d) are out of the case.

Mr. Bunn: I will just present written motions and file them even though they have already been denied?

The Court: Yes, I will deny them when they come in. So that will dispose of your motions.

And the motion for a directed verdict at the close of all the evidence will be denied.

169 The Court: Well, let us see what we have here. We will take plaintiff's instructions. Have you had time to look at them?

Mr. Bunn: Just partially.

The Court: I looked at them hurriedly. They seem to be stock instructions. I don't know, there may be something you want to object to. I will hear you on that Wednesday morning.

Mr. Bunn: Wednesday morning you will pass on them?

The Court: Yes. Let us see about the defendant's instructions.

Mr. Rafferty: The only one I would object to is No. 4, and that is because I have withdrawn certain charges from my complaint. It refers to "one or more acts." I believe that if your Honor will start at the end of the second line and delete the words "one or more of—"

The Court: Yes. There is only one act.

Mr. Rafferty: Singularize the word "acts." Then I believe the instruction would be in order, and then I believe the other defendant's instructions are correct.

The Court: "One of the acts."

Mr. Rafferty: "Guilty of the act of negligence charged in the plaintiff's complaint," I think it should be.

I also see Mr. Bunn has included an instruction defining negligence, which I am inclined to think is almost word for word the same as mine. I have no objection to withdrawing mine; or if he cares to withdraw his No. 10—they are duplicates.

The Court: What is your number?

Mr. Rafferty: Mine is letter "I."

The Court: All right. I will let you withdraw it.

Mr. Rafferty: All right, your Honor.

The Court: That is proximate cause. No—that is J. Wait a minute.

Mr. Rafferty: J I do want given, your Honor. That is proximate cause.

The Court: Oh, yes.

Mr. Rafferty: Instruction I defines negligence. That is a duplicate of Mr. Bunn's No. 10.

The Court: You are withdrawing I?

Mr. Rafferty: I withdraw I.

The Court: If there is anything you want to call the Court's attention to that you have overlooked, you may do that Wednesday morning.

How long do you gentlemen want to talk about the case to the jury?

Mr. Rafferty: I think about half an hour will be ample time for me.

171 The Court: Twenty-five minutes on a side. All right.

(Whereupon an adjournment was taken to 10:00 o'clock a.m., Wednesday, February 23, 1955.)

172

* * (Caption No. 53 C 1687) * *

Court convened pursuant to adjournment.

Present:

MR. ROBERT J. RAFFERTY,
Appeared on behalf of the Plaintiff;
MR. WILLIAM F. BUNN,
Appeared on behalf of the Defendant.

The Court: I told you gentlemen to look over your instructions; and if you had any further comments, to make them this morning. I will take up plaintiff's instructions first. Are there any objections to plaintiff's instructions?

Mr. Rafferty: I believe it was K, the complaint instruction. I have revised it in several points, your Honor.

The Court: You are withdrawing K and substituting another one for K?

Mr. Rafferty: That is correct, your Honor.

The Court: Is there anything further about the plaintiff's instructions?

Mr. Bunn: Judge, over the holiday yesterday I had a chance to go over the instructions, and I want to call to the Court's attention several instructions that I had noticed that I think might possibly not be proper here.

First of all, the plaintiff's instruction No. A has to do with interstate commerce. That has already been stipulated to. It is accepted. It is no longer in issue.

The Court: What about that?

Mr. Rafferty: The instruction A, your Honor, merely tells them that the parties are subject to the Federal Employers Liability Act, that they were engaged in interstate commerce.

The Court: I think I will give that. What else?

Mr. Bunn: Again in Instruction B, and the same applies to C. certain sections of the Federal Employers Liability Act are set out, and again the provisions of that statute are not in dispute. It is admitted the parties fall under that statute. I think Mr. Rafferty's instruction, 174 where the specific charge of negligence is "failing to provide the plaintiff with a reasonably safe place to

work," I think that is the basis of the negligence under which this suit is brought. Therefore, B and G, not being in issue, I don't think they would be applicable here.

Mr. Rafferty: I think they are proper. They tell the jury the law under which the case is brought.

The Court: Yes. I gave some thought to that when I went into it. I will give those.

Mr. Bunn: Well, now, Judge, if I may at this time also make a statement insofar as plaintiff's instruction C is concerned, instruction C deals with the assumption of risk, and that has never been a defense, affirmative or otherwise, on the part of the defendant. I think that an instruction of that sort unduly prejudices the defendant in that when it is read to the jury, I think it tends to lend credence to a theory that any time a man is hurt on the job, anything may be wrong on the premises, any defect of any sort, he does not assume anything that he finds wrong.

The Court: What do you say?

Mr. Rafferty: This is the language of the statute itself, and jurors may commonly believe railroading is a dangerous occupation and, therefore, if a man gets hurt, it is too bad.

The Court: I will give that one. What else?

Mr. Bunn: Now, as far as the complaint instruction, Plaintiff's Exhibit K, as amended, is concerned, we don't think it is proper to give a complaint instruction. Very many of the allegations that are set forth in this complaint instruction are not in dispute. We have never contested many of the charges that are placed in here.

The Court: Doesn't it set out what is in the complaint, however?

Mr. Bunn: Yes, it does. In other words, the plaintiff, Mr. Webb, sets out fully what was in the complaint, and if your Honor reads all of these allegations here, I think it would have a tendency to place some undue emphasis on that instruction.

The Court: Well, the courts have held that to be a good instruction. I will give that. Anything further on the plaintiff's instructions?

Mr. Bunn: Yes, sir. Plaintiff's instruction M, your Honor. I think an instruction of that sort, reading it to

the jury, there would be an inference from that, that the employee can do practically anything he wants on the job, that he has to exercise no care at all as far as his own conduct is concerned.

The Court: That has been passed on. I will give that one.

Mr. Bunn: The last one, your Honor, is Plaintiff's instruction N. In that instruction all of the elements that the jury can consider as far as elements of damage are concerned are set out in full there, and I think that plaintiff's instruction O is unnecessary repetition.

The Court: You are talking about N?

Mr. Bunn: Yes, your Honor. I merely want to call to the Court's attention that N I think fully covers all of the elements of damages, and that instruction O, immediately following, is an unnecessary repetition of the elements of damage.

The Court: What do you say about that?

Mr. Rafferty: That is a stock instruction, merely telling the jury no witness has to give an estimate as to the value of pain and suffering. It is a stock instruction, not covered in the damage instruction.

Mr. Bunn: I think plaintiff's instruction O, the part reading from "it is not necessary" — do you find that in plaintiff's instruction O?

The Court: Yes, I have it.

Mr. Bunn: "It is not necessary that any witness shall have expressed an opinion," I think that if that were merely tacked on to the end of N, that would cover anything that was to be brought out.

The Court: No. I think I will give that one. Anything else?

Mr. Bunn: One other thing. Here, incidentally, are the two motions that you asked me to file, motions at the close of all the evidence. They have been signed now, and I will give a copy to Mr. Rafferty.

The Court: And those will be denied. Now, is that all?

Mr. Bunn: Just one thing, your Honor. I would like to take a moment of the Court's time to discuss the proceedings that we had Monday. I think that if the Court would read the statement taken of the plaintiff about a month after the accident, the Court would find that there

are certain statements in there that would be otherwise highly inadmissible, insofar as it makes reference to the fact that plaintiff has a wife, three small children, two grown children.

On Monday, when the impeaching part of that statement was read — I recall the way the occurrence took place — the Court asked whether or not either one of 178 the parties were going to put this statement that was being read in evidence, and Mr. Rafferty said, "Yes, let us put it in." And, of course, before the jury I was in a position where I could not very well begin a hot contest as to whether or not it should go in.

The Court: Well, but I grant to have the jury hear one thing — I think, as I recall, that is the reason I raised that question. You started to read from it.

Mr. Bunn: Yes, I was reading an impeaching part.

The Court: No. I will have to let that go in, in view of the fact that it did go in by agreement.

Mr. Rafferty: Yes.

The Court: As I recall it. I cannot take that from the jury now. Anything else? Any objection to the defendant's instructions?

Mr. Rafferty: Your Honor, the only objections I had were, I believe, to instructions 1 and 2, and that was because of the fact that they referred to several counts in the original complaint where it had been amended to have only one. I think instruction No. 1 I took up with the Court. Instruction No. 1 of the defendant, in the second line, "was not guilty of the charge". That should be the correction.

The Court: That is right, I guess.

Mr. Rafferty: "Made against it in the complaint, 179 but the burden of proof is upon the plaintiff and plaintiff must prove by a preponderance of the evidence that the defendant was guilty of the" — strike out "one or more" — "the charge of negligence made in plaintiff's complaint."

The Court: That is right. Strike out "one or more." Anything further?

Mr. Rafferty: Defendant's instruction No. 4, your Honor, starting at the end of line 2, "that the defendant was guilty of", the words "one or more of the" should be deleted.

The Court: "Guilty of the act of negligence."

Mr. Rafferty: "Guilty of the act of negligence."

The Court: Yes.

Mr. Rafferty: Beyond that, no objections, your Honor.

The Court: All right, gentlemen.

Mr. Rafferty: Your Honor, we have straightened out the matter of the accuracy of Plaintiff's Exhibit 1. That was the wage scale that the witness testified to. I now offer that in evidence.

The Court: All right.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

The Court: After further reflection on the statement, if you refer to the statement, I will delete the parts I have marked out there.

Mr. Rafferty: If there is any serious question, I will be agreeable to withdrawing it.

Mr. Bunn: That was your exhibit, Mr. Rafferty.

Mr. Rafferty: Can't we withdraw it by agreement, or do you want it in?

Mr. Bunn: Is that completely in or out?

The Court: I have taken that part out.

Mr. Bunn: The only occasion I would have to refer to it would be as to the impeaching part.

The Court: For whatever purpose you think it is necessary — but this part (indicating) goes out.

Mr. Bunn: All right, your Honor.

Mr. Rafferty: That is all right with me.

The Court: Do you want to leave it in or take it out, with that out? It won't go to the jury anyway.

Mr. Bunn: It won't go to the jury?

Mr. Rafferty: I am not going to refer to it.

Mr. Bunn: The only reference I would have to make is to the impeaching part, and that was the only reason it was ever used in the first place.

The Court: All right. You can make that. I will strike that out. It won't go to the jury. You may refer to it.

(Whereupon the Jury heard the arguments of 181 counsel for the respective parties. Arguments not transcribed.)

The Court: You will now be given the law in this 182 case.

(9)

"Preliminary to your being accepted and sworn to act as jurors in this case you were examined as to your qualifications and competency to serve as jurors in this case. As a part of such examination each of you answered all questions asked you by the Court and suggestions by both counsel for the plaintiff and the defendant. Your answers showed that you were competent and qualified to act as jurors and the parties to this suit accepted you as jurors on the faith of your answers. The answers you then made to said questions in regard to your competency, qualifications, fairness, lack of prejudice and freedom from passion and sympathy are as binding on you now as they were then and should so remain until you are finally discharged from further consideration of the case. It would be improper for you to disregard these answers that rendered you competent/jurors."

(F)

"In considering this case and in passing upon your verdict, you are not required to set aside your own observations and experience as men and women in the affairs 183 of life, but, on the other hand, you have a right, upon consideration of all the evidence in the light of your common observation and experience as men and women in the affairs of life, to say where the truth lies upon any material fact in the case."

(7)

"It is your duty to consider this case in all its bearings and to decide the issues precisely the same as you would if it were a suit between two individuals; and the fact that the plaintiff is an individual, and the defendant is a railroad corporation, should make no difference. A railroad company is entitled to the same fair and unprejudiced treatment in courts of law as individuals would be under like circumstances. In considering and deciding this case you should look solely to the evidence for the facts, and to the instructions for the law, and find your verdict without reference to and without being influenced by the personality of either the plaintiff or the defendant."

(6)

You are instructed that if, in the opening statement or in putting in the evidence, or in argument, counsel for either party has made any statement in reference to 184 the facts in this case not based upon the evidence, you should wholly disregard such statement."

(E)

"The degree of proof required of the plaintiff is that he prove his case by a preponderance of the evidence. This means that upon the questions of fact which the plaintiff is required to prove he must have a greater weight or preponderance of evidence. But this rule does not require the plaintiff to prove any fact beyond a reasonable doubt; a fact is sufficiently proved if you find that the greater weight of the evidence is in his favor."

(1)

"The burden of proof is not upon the defendant in this case to show that it was not guilty of the charge made against it in the complaint, but the burden of proof is upon the plaintiff and the plaintiff must prove by a preponderance of the evidence that the defendant was guilty of the charge of negligence. Preponderance of the evidence means the greater weight of the evidence. You are not allowed to supply any proof or evidence by conjecture, speculation or guess of your own. Unless you find from the evidence in this case that the plaintiff has proved such negligence as charged in the complaint 185 by a preponderance of the evidence, your verdict should be in favor of the defendant."

(K)

"The Court instructs you that in his complaint the plaintiff alleges and charges that on July 2, 1952, he was a member of a train crew employed by the defendant which was engaged in certain switching operations in or near Mount Olive, Illinois; that in the course of his employment he observed a car leaking grain and while going toward a caboose to get some waste material to plug a hole in the bottom of this car, he stepped upon a large

clinker which was imbedded in loose cinders and he was caused to lose his footing and injure his left knee; he alleges that at this time and place the defendant was guilty of negligence or unlawful conduct which directly and proximately caused, or directly and proximately contributed to cause, the accident in question and the plaintiff's injuries in that it allegedly failed to use ordinary care to furnish the plaintiff with a reasonably safe place to work and perform the duties of his employment, and it is charged that as a result of the accident the plaintiff suffered and will continue to suffer severe injuries to his left leg, pain and suffering, and losses of large sums of money.

"The defendant by its answer has denied that it 186 was guilty of any alleged act of negligence as charged by the plaintiff at the time and place in question, which proximately caused or proximately contributed to cause the accident in question, and it alleges that the injuries complained of by plaintiff resulted solely from plaintiff's own negligence, and it denies that it is indebted to the plaintiff in any amount."

"You are instructed that the complaint and answer in this cause contain merely the unsworn statements of the parties and neither prove or tend to prove any allegations contained in them."

(A)

"You are instructed that it appears here without dispute that at the time of the accident both the plaintiff and defendant were engaged in interstate commerce and transportation and, therefore, the rights, duties and liabilities of the parties to this action are governed and controlled solely and exclusively by the Federal Employers' Liability Act of the United States."

(B)

"The Federal Employers' Liability Act of the United States, which is applicable in this case, provides that:

187 "Every common carrier by railroad while engaging in commerce between the several states***shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce

for such injuryresulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' ”

(C)

“This same law further provides as follows:

“ ‘That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injuries***resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier.’ ”

(D)

“The Federal Employers’ Liability Act of the 188 United States further provides:

“In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

“You are further instructed that the issue of contributory negligence on the part of the plaintiff is what is known as an affirmative defense and the burden of proof thereon is upon the defendant.”

(L)

“You are instructed that it was the duty of the defendant to use ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work, and 189 if you find from the evidence that the defendant failed to use ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work, and that such failure, if any, on the part of the defendant to

furnish such place was the direct and proximate cause of the injuries, if any, sustained by the plaintiff, then your verdict should be in favor of the plaintiff and against the defendant."

(M)

"The Court instructs you that an employee has a right to assume that his employer has exercised ordinary care with respect to providing him with a reasonably safe place in which to work."

(5)

"The defendant was not required under the law to furnish the plaintiff a place to work which was absolutely safe. Its duty in that respect was only to exercise ordinary or reasonable care to provide a reasonably safe place for plaintiff to do the work he was doing at the time of the occurrence."

(10)

"You are instructed that negligence is the omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable person would not do."

(2)

"You are instructed that immediately prior to and at the time of the occurrence complained of it was the duty of the plaintiff to exercise reasonable and ordinary care for his own safety. If you find from a preponderance of the evidence that on said occasion plaintiff was negligent and that such negligence, if any, was the sole proximate cause of the injuries, if any, sustained by the plaintiff, you should find the defendant not guilty."

(J)

"The term proximate cause whenever used in these instructions means that cause which of itself or in combination with other causes in natural and continuous sequence unbroken by any efficient intervening cause produced the result complained of and without which the result would not have occurred."

(G)

"The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon 191 which side the preponderance of the evidence is, it is your duty to take into consideration the number of witnesses testifying upon one side or the other of a disputed point; the opportunities of the several witnesses for seeing, or knowing the things about which they testify; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, and from all of these circumstances together with all the other facts and circumstances proved upon the trial, determine upon which side is the greater weight or preponderance of the evidence."

(8)

"You are the sole judges of the facts in the case, the credibility of the witnesses, and of the weight to be given to their testimony. And, in anything that the Court may have said throughout the trial, or anything that the Court may say in these instructions, the Court has not intended and does not now intend to express any opinion upon the facts of the case, on the credibility of the witnesses, or the weight to be given to their testimony. On the other hand, the Court is the sole judge of the law in the case, and it becomes your duty to follow the law as it 192 is given to you by the Court in his instructions."

(12)

"While the law permits the plaintiff in a case to testify as a witness in his own behalf, nevertheless you have the right, in weighing his evidence for the purpose of determining how much credence should be given to it, to take into consideration the fact that he is the plaintiff and is interested in the result of the suit."

(H)

"Under the law the plaintiff is a competent witness to testify in his own behalf in this suit. You should not disregard the plaintiff's testimony merely because he is the plaintiff and interested in your verdict, but you should

consider his testimony in connection with all the evidence in the case, and give his testimony such weight and credit as you believe it entitled to from all the facts and circumstances in evidence."

(P)

"You are instructed that certain mortality tables were received in evidence tending to show the expectation of life of the plaintiff. These tables are not conclusive 193 or binding upon you. The plaintiff may die before his expectancy has been reached, and on the other hand, he may live longer than his expectancy. These tables were received as an aid to the jury in determining the probable expectancy of the life of the plaintiff, and, if you find that the plaintiff's injuries, if any, were permanent, you are to give them such weight as you find they are entitled to receive in the light of your commonsense and experience. The expectancy of life should not be used as a factor by merely multiplying the years of expectancy by the annual earnings. The award of damages for loss of future earnings must be reduced to its present cash value and adequate allowances must be made for the earning power of money. You are entitled to consider all factors or circumstances which might tend to increase or decrease the pecuniary loss."

(N)

"You are instructed that if you find for the plaintiff you will be required to determine the amount of his damages. In determining the plaintiff's damages, if any, you should determine the amount of damages suffered by him directly and proximately in consequence of such injuries, if any, and you should find the amount of 194 damages to be such a sum of money as will fully, fairly, justly and adequately compensate him for such injuries. In determining the amount of such damages, if any, it is your duty to take into consideration his age, earning capacity, and the character, extent and severity of such injuries, if any, the pain and suffering, if any, that he has endured up to the present time, and the pain and suffering, if any, that it is reasonably certain he will endure in the future; you will take into consideration such disability, if any, as he has suffered up to the present

time and such disability, if any, as it is reasonably certain he will suffer in the future therefrom; you should take into account and consideration the extent, if any, to which he has been incapacitated to work and earn money in consequence of such injuries, provided that you find from the preponderance of the evidence that he has been incapacitated to work and earn money, and the amount of earnings, if any, which plaintiff has lost from the time he was injured up to the present time directly and approximately in consequence of his injuries, and the amount of earnings, if any, it is reasonably certain from the preponderance of the evidence he will lose in the future directly or proximately in consequence of said injuries,

if any, so far as any of the above mentioned elements
195 of damage, if any, have been alleged in the plaintiff's complaint and proven by a preponderance of the evidence; and thereby the jury will determine from the evidence what sum will be a fair and just compensation for such injuries, if any, if they find a verdict for the plaintiff."

(4)

"You are further instructed that if you find from a preponderance of evidence that defendant was guilty of the act of negligence charged in the plaintiff's complaint and that such negligence, if any, was a proximate cause of such accident, but if you further find that with respect to such accident plaintiff was also negligent and that his negligence, if any, contributed to causing his injuries, then you should diminish plaintiff's damages in proportion to the amount of negligence, if any, attributable to the plaintiff."

(O)

"The Court instructs you that if, under the evidence and instructions of the Court, you find the defendant guilty and that the plaintiff has sustained damages by reason of physical injury and pain and suffering, if any,

by him sustained as a natural, direct and proximate
196 result of being injured in the accident in question, then, to enable you to estimate the amount of such damages, if any, caused by physical injuries, pain and suffering, it is not necessary that any witness should

have expressed an opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances proved by the evidence, considering these in connection with their knowledge, observation and experience in ordinary affairs of life."

(3)

"You should not consider the question of damages in this case until you have first determined whether or not the defendant is liable for the loss and damage claimed by the plaintiff, and if you find from the evidence and the instructions of the Court that the defendant is not liable to the plaintiff, then you will have no occasion at all to consider the question of damages. The fact that the Court has given any instructions on the subject of plaintiff's damages, if any, or that defendant's counsel have discussed such subject, is not to be taken by you as any intimation on the part of the Court or any admission on the part of the defendant that the defendant is liable for the loss and damage charged in the complaint."

(11)

"Sympathy for the injuries and disabilities of the plaintiff, if any, from whatever source they may come, should have no influence upon you in determining whether or not the defendant is liable or, if liable, control in any way your verdict. Both the question of liability and that of damages are matters to be determined from the evidence and under the instructions of the Court. Prejudice, sympathy or any side matters should not affect your judgment. In other words, it is your duty to give every question in the case a calm, careful and conscientious consideration, uninfluenced by sympathy, or any consideration other than the evidence and the law as given to you in these instructions."

Your first duty in going into the jury room will be to select a foreman. Whichever verdict you sign, have your foreman sign at the top and the rest of you underneath.

If you find the defendant guilty, you will all sign this form:

"We the jury find the defendant guilty and assess the plaintiff's damages at the sum of _____ dollars and _____ cents."

Fill that in. If you find the defendant not guilty, you
198 will all sign this form:

"We the jury find the defendant not guilty."

The Court: Marshals be sworn.

The Clerk: You and each of you do solemnly swear that as bailiffs in charge of this jury you will provide for them a suitable and convenient place for their deliberations, that you will allow no one to speak to them or tamper with them, nor will you speak to them yourselves, except to ascertain whether they have agreed upon a verdict. So help you God.

The Court: All right, you may retire.
(Whereupon the jury retired to consider of their verdict.)

The Court: Do you gentlemen agree on a signed and sealed verdict in case the jury does not come in during court hours?

Mr. Bunn: Yes.

Mr. Rafferty: Yes.

The Court: If you desire, if it is sealed, if they come in during court hours or while the Clerk is here, he will open it, and if you will leave your cards, he will tell you what the verdict is. Is that agreeable to you?

Mr. Rafferty: Yes.

199 The Court: For the record, it is, I take it, agreeable to you, Mr. Bunn?

Mr. Bunn: Yes, sir.

The Court: Also, in order to keep a date on this, if a motion is made for new trial by either side, I will set the date for March 11, 1955, at 10:00 o'clock.

The Clerk: Signed and sealed verdict is agreed to, and it is agreed to waive the polling of the jury?

Mr. Rafferty: Yes.

Mr. Bunn: Yes, sir.

* * (Caption No. 53 C 1687) * *

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Certificate

I hereby certify that the foregoing 182 typewritten
200 pages, numbered from 1 to 182, inclusive, are a true and accurate transcript of my original official short-

hand notes taken of the proceedings had upon the trial of the above entitled cause before Honorable Philip L. Sullivan, one of the Judges of said Court, and a jury, on February 18, 21 and 23, 1955, and contain all of the oral proceedings had upon the trial of said cause, with the following exceptions:

1. Jury voir dire
2. Opening statements
3. Arguments.

Alfred H. Frederick,
Official Court Reporter
United States District Court
Northern District of Illinois.

April 4, 1955.

201 And afterwards on, to wit, the 26th day of April, 1955 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had On February 18, 1955, Before The Honorable Philip L. Sullivan, Judge, in words and figures following, to wit:

203 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 53 C 1687)

TRANSCRIPT OF CERTAIN PROCEEDINGS

had upon the trial of the above-entitled cause before the Honorable Philip L. Sullivan, one of the judges of said court, and a jury, at Chicago, Illinois, on February 18, 1955, namely, the opening statement by counsel for the defendants.

Appearances:

Mr. Robert J. Rafferty,
On Behalf of the Plaintiff;
Mr. William F. Bunn,
On Behalf of the Defendant.

204 OPENING STATEMENT ON BEHALF OF DEFENDANT.

By Mr. Bunn:

May it please the Court, Counsel, ladies and gentlemen of the jury:

I just wish to caution you again at this time that, as Mr. Rafferty brought out very clearly, anything Mr. Rafferty or myself might say at this time is not to be considered by you as evidence. Your final decision, as far as this case is concerned, will be determined by the evidence that you hear from the witnesses or from the exhibits that are introduced in evidence.

Mr. Rafferty pretty clearly brought out the factual situation as far as the general location is concerned. Mount Olive is a town not too distant from East St. Louis. It is a small town.

The Plaintiff, Mr. Webb, at the time of the occurrence in question, was on this run from East St. Louis to Clinton, Illinois. Now, Mr. Webb had been, I think the evidence will show, a member of these crews that were going from East St. Louis to Clinton and return for some six or seven years at a minimum.

At Mount Olive, I think the evidence will show, Mr. Webb was accustomed to working around the house track switch, which is approximately the location where he fell.

He had been working there practically every day. Part 205 of Mr. Webb's duty was to handle the switches, and take cars off the track and bring them on to the main track, or set them out on side tracks. The side track is the location of the accident in question.

Now, Mr. Webb and the rest of the crew, I think the evidence will show, were working their train near the house track switch, and that Mr. Webb gave a signal to the engineer of the train to move forward after Mr. Webb had uncoupled one of the cars. At that moment he turned, started to walk to his right. At the time he was looking at the ground, I think the evidence will show. Mr. Webb saw nothing. The next thing Mr. Webb knew is that he fell. He never saw a clinker. I think the evidence will

show that after he fell, after he had landed on the ground, he looked around, at that time saw this clinker, which was just barely discernible when he first saw it.

Now, I think that the evidence will, in addition, show that none of the members of the train crew saw Mr. Webb actually fall. As far as the cinder is concerned, Mr. Webb cast the cinder away. So the only testimony you will hear about the cinder, its size, its presence, where it was, is the testimony of Mr. Webb, because the cinder was 206 thrown away.

Now, as Judge Sullivan pointed out, Mr. Webb, through his attorney, Mr. Rafferty, has brought suit against his employer under the Federal Employers Liability Act, and Judge Sullivan pointed out to you several charges of negligence Mr. Webb was making against his employer; and we in turn contend that the cause of this accident, if it was not solely Mr. Webb's fault he, at least, contributed as much as Illinois Central would have. We frankly did not think that we had failed to do anything that the law required us to do toward keeping the place Mr. Webb was working as a safe place to work. As to the law on that subject, Judge Sullivan, I believe, at the close of the case, will instruct you what our duty is as far as the place where these men work.

Now, Mr. Rafferty pointed out following this occurrence, Mr. Webb, the Plaintiff, received treatment by the local doctors down near Mount Olive, Litchfield and Clinton, and then subsequently came up here to Chicago, where he was treated at the Illinois Central Hospital. He was ultimately operated on to remove cartilage in his leg, and in that space of time, the treatment he received, that was done at the expenses of the company, not at the expense of Mr. Webb.

207 Mr. Rafferty: Object, your Honor, because that is not the fact. The fact is that the Illinois Central employees contribute to their own hospital plan and pay as much as the company does for any medical expense.

Mr. Bunn: We will prove that point, your Honor.

Ladies and gentlemen, we will bring in men who have worked on that roadbed, men who have constructed or repaired or replaced the ties around the location of this

house track switch, and the men that inspect the track along that location, to give you ladies and gentlemen an understanding of just what the Illinois Central does to try to protect the men.

As far as the clinker is concerned, I think the evidence will show that Mr. Webb had never seen any large clinkers in that area prior to the accident; and since it happened, according to Mr. Rafferty's statement, two or three weeks after this alleged construction work was done, he apparently had never seen it during that two or three week period, even though he had been over it every day.

Of course, in any case like this, you know there are two sides to every question, so I will only ask at this time that you keep an open mind until all the evidence is in, and then at the close of the evidence I will ask you to
208 bring in a verdict of not guilty.

I thank you.

209 IN THE UNITED STATES DISTRICT COURT
 Northern District of Illinois
 Eastern Division
* * (Caption—Civil Action No. 53 C 1687) * *

CERTIFICATE

I hereby certify that the foregoing 6 type-written pages, numbered consecutively from 1 to 6, inclusive, are a true and accurate transcript of my original official shorthand notes taken of the opening statement by Counsel for Defendant at the trial of the above-entitled cause before Honorable Philip L. Sullivan, one of the Judges of said Court and a jury on February 18, 1955.

/s/ *Alfred H. Frederick*
Alfred H. Frederick,
— Official Court Reporter
United States District Court,
Northern District of Illinois.

April 25, 1955.

210 And afterwards on, to wit, the 10th day of May, 1955
there were filed in the Clerk's office of said Court cer-

110 *Plaintiff's Exs. 1 & 2 & Defendant's Exs. 1, 2, 3, 4.*

tain Plaintiff's Exhibits 1 and 2, and Defendant's Exhibits 1, 2, 3 and 4, in words and figures following, to wit:

Plaintiff's Exhibit No. 1.		
211		
July 1952	Irregular Frt.	\$12.55 per day
Escalator Scale —		
Oct. 1952	Irregular Frt.	12.71 per day
Jan. 1953	Irregular Frt.	12.95 per day
Apr. 1953	Irregular Frt.	12.71 per day
July 1953	Irregular Frt.	12.71 per day
Oct. 1953	Irregular Frt.	12.95 per day
Permanent Wage —		
Dec. 1, 1953	Irregular Frt.	13.35 per day
July 1952	Local Frt.	\$13.02 per day
Escalator Scale —		
Oct. 1952	Local Frt.	13.18 per day
Jan. 1953	Local Frt.	13.42 per day
Apr. 1953	Local Frt.	13.18 per day
July 1953	Local Frt.	13.18 per day
Oct. 1953	Local Frt.	13.42 per day
Permanent Wage —		
Dec. 1, 1953	Local Frt.	13.82 per day
	Thru	Loc.
1949	10.59	11.06
1950	11 50 10.99	11.46
1951	4-51 12.07	12.54

Plaintiff's Exhibit No. 2.

Clinton, Ill., August 7, 1952.

212 Statement of J. W. Webb, Conductor and Brakeman:

I am 46 years of age, married, and live 814 E. Macon Street, Clinton, Illinois. I have been in the service of the ICRR Co. since June 1925. My social security No. is 709-01-7771. I carry group insurance but no other accident insurance.

I was injured while on duty as Flagman on local freight train No. 68 at Mt. Olive, Illinois at 11:05 AM, July 2, 1952. The weather was fair at the time. We had eight cars in our train and on arrival at Mt. Olive stopped on the main then head toward the siding and backed the whole train toward the house track, where we coupled the rear to a box car and pulled it and the train out of the house track and then backed toward the main with all of them. We stopped with the engine and one car on the house track switch. I cut behind the head car in the train, told the head brakeman to pick up two cars from the L&M connection

and that I would go back and plug a hole in the bottom of a car of wheat which was leaking badly. As I started to walk to the caboose to get some waste to plug the hole with,

I took one step and stepped on a cinder buried in the loose cinders about a foot from the end of the ties. When I stepped on this cinder it threw me off balance, caused me to fall and I injured my left knee as I fell. This happened about 15 feet south of the house track switch on the east side of the house track. This track had been worked on shortly before this by the trackmen and the cinders were stirred up and loose and this large cinder about six inches in circumference was buried in the loose cinders around it so that it was not discernible from the rest of the small loose cinders. It looked like the surface was level and good enough footing but this cinder being solid in the loose cinders caused my foot to turn as I stepped on it, turned my foot and caused me to fall so that I injured the cartilage in my knee as I fell. It pained me severely when it happened, but I managed to go ahead and plug the hole in the wheat car and then I got on the caboose and rode the train on in to Clinton in the caboose. Enroute, while our train was doing work at Litchfield, I went to Company Surgeon Sihler there for attention. He told me that I had injured the cartilage in my knee and suggested that I go on to Clinton and report to the Company Doctor there which I did. I was attended by Dr. Sinow at Clinton, remained under his care for two weeks and he then sent me to the Illinois Central hospital in Chicago. I went to Chicago on July 17 and remained in the hospital there until July 28 when I was released back to Dr. Sinow because Dr. Sinow could give me the same treatment that I was getting in Chicago. I am still under the care of Dr. Sinow who has since put my left knee and left leg in a cast which I am wearing now. I do not know what the outcome of my injury will be nor when I will be released by Dr. Sinow. The injury to my left knee was the only injury I received in this accident. My rate of pay is \$13.02 per hundred miles. My earnings on an average will amount to from \$500 to \$600 per month. Brakeman C. J. Stephenson was close to me but walking away from me when this accident happened.

I have read the foregoing and it is correct.

J. W. WEBB.

Witnessed:

J. R. Mann

DEFENDANTS EXHIBIT 1.



214

Defendant's Exhibit No. 2.

STATEMENT

ILLINOIS CENTRAL HOSPITAL

5800 Stony Island Avenue
Chicago 37, Illinois

February 21, 1955

Illinois Central Railroad for services furnished

Mr. John W. Webb,
814 E. Macon St.,
Clinton, Illinois.
Room: 341

ALL CHARGES PAYABLE WEEKLY IN ADVANCE
PHYSICIAN'S CHARGES NOT INCLUDED IN THIS BILL

Date	Item	Charge	Credit	Balance Due
9-9-52	29 days room and board @			
4:30 PM	\$8.50 per day	246.50		
	Laboratory service	10.00		
Thru	X-ray service	8.50		
	Medications	12.83		
10-8-52	Dressings	2.45		
3:00 PM	Operating room	30.00		
	Anesthesia	15.00		
	Physical therapy	42.00		
		<u>\$367.28</u>		00

114 Defendant's Exhibits Nos. 3 and 4.

215 Defendant's Exhibit No. 3.

STATEMENT

ILLINOIS CENTRAL HOSPITAL

5800 Stony Island Avenue
Chicago 37, Illinois

February 21, 1955

Illinois Central Railroad for services furnished

Mr. John W. Webb,
814 E. Macon St.,
Chicago, Illinois.
Room: 361

**ALL CHARGES PAYABLE WEEKLY IN ADVANCE
PHYSICIAN'S CHARGES NOT INCLUDED IN THIS BILL**

Date	Item	Charge	Credit	Balance Due
7-17-52	11½ days room and board @			
9:30 AM	\$10.25 per day	117.88		
	Laboratory service	8.00		
Thru	Physical Therapy	25.00		
	X-ray service	16.00		
		<u>\$166.88</u>		
7-28-52				00
4:00 PM				

216 Defendant's Exhibit No. 4.

CHESTER C. GUY, M.D.

5800 Stony Island Ave.
Chicago 37, Ill.

Hours 3 to 5
Mon. - Tues. - Thurs. - Fri:

Midway 3-9200
October 1, 1952

Illinois Central Railroad
Chicago, Illinois

IN ACCOUNT WITH

Professional services furnished
case of John Wesley Webb
ICRR Conductor
Clinton, Ill.
Paid

\$300

217 And on, to wit, the 21st day of February, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain five (5) motions in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
218 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the Court to instruct the jury to find the defendant not guilty for the following reasons:

- (a) The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Complaint;
- (b) The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Complaint;
- (c) The evidence affirmatively shows that the injuries complained of resulted solely from the plaintiff's negligent conduct at the time and place of the occurrence in question;

and with this motion tenders to the Court, separately and distinctly from any other instructions tendered in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty."

219 with the request that the Court mark that instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

116 *Motion of Defendant in re: Instruction to Jury.*

220 The Court instructs the jury to find the defendant not guilty.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
221 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the court to instruct the jury to find the defendant not guilty as to paragraph 6(a), wherein it is charged that the defendant was negligent in failing to use ordinary care to furnish the plaintiff with a reasonably safe place to work and to perform the duties of his employment, and with this motion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

“The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(a) of the plaintiff’s complaint,”
with the request that the Court mark said instruction “GIVEN” and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

The Court instructs the jury to find the defendant
222 not guilty of the charge in paragraph 6(a) of the plaintiff’s Complaint.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
223 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F.

Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the court to instruct the jury to find the defendant not guilty as to paragraph 6(b), wherein it is charged that the defendant was negligent in placing a large clinker among the cinders constituting its roadbed and thereby created a hazardous condition for its employees working upon or about its aforementioned tracks, and with this motion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

“The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(b) of the plaintiff’s Complaint,”
with the request that the Court mark said instruction “GIVEN” and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

The Court instructs the jury to find the defendant
224 not guilty of the charge in paragraph 6(b) of the
plaintiff’s Complaint.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C. 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
225 RAILROAD COMPANY, a corporation, by Herbert
J. Deany, Charles I. Hopkins, Jr., and William F.
Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the Court to instruct the jury to find the defendant not guilty as to paragraph 6(c), wherein it is charged that the defendant was negligent in repairing or reconstructing its aforementioned roadbed, failing to inspect the materials used for said purpose, and carelessly and negligently allowed and permitted a large clinker to be placed among loose cinders adjacent to the aforementioned tracks, and with this mo-

tion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(c) of the plaintiff's Complaint,"

with the request that the Court mark said instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant

The Court instructs the jury to find the defendant
226 not guilty of the charge in paragraph 6(c) of the plaintiff's Complaint.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, ILLINOIS CENTRAL
227 RAILROAD COMPANY, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the Court to instruct the jury to find the defendant not guilty as to paragraph 6(d), wherein it is charged that the defendant was negligent in the promises and violated established rules, customs and practices, and with this motion tenders to the Court, separately and distinctly from any other instructions in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(d) of the plaintiff's Complaint,"

with the request that the Court mark said instruction "GIVEN" and read the same to the jury.

Herbert J. Deany
Charles I. Hopkins, Jr.
William F. Bunn
Attorneys for Defendant.

The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(d) of the plaintiff's Complaint.

And on the same day to wit, on the 21st day of February, 1955, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to wit:

230

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

This being the day to which this cause was continued for further trial again come the parties by their counsel and the Jury impaneled and sworn herein also come and the trial proceeds and at the close of the plaintiff's case the defendant by its counsel enters its motion for a directed verdict and said motion hereby is taken under advisement and the trial proceeds and at the close of defendant's case the Court being fully advised it is

Ordered that the defendant's motion for a directed verdict made at the close of plaintiff's case be and the same hereby is denied and the hour of adjournment having arrived it is

Further Ordered that this cause be and the same hereby is continued to February 23, 1955 at 10:00 A.M. for further trial

231 And afterwards, on, to wit, the 23rd day of February, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motions in words and figures following, to wit:

232

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Now comes the defendant, Illinois Central Railroad Company, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at

the close of all the evidence offered on behalf of both parties, and moves the Court to instruct the jury to find the defendant not guilty for the following reasons:

(a) The evidence fails to show that the defendant was guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Complaint;

(b) The evidence affirmatively shows that the defendant was not guilty of any one or more of the negligent acts or omissions charged by plaintiff in his Complaint;

(c) The evidence affirmatively shows that the injuries complained of resulted solely from the plaintiff's negligent conduct at the time and place of the occurrence in question;

and with this motion tenders to the Court, separately and distinctly from any other instructions tendered in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty."

233 with the request that the Court mark that instruction "Given" and read the same to the jury.

Herbert J. Deany

Charles I. Hopkins, Jr.

William F. Bunn

: Attorneys for Defendant.

234 The Court instructs the jury to find the defendant not guilty.

235

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Now comes the defendant, Illinois Central Railroad Company, a corporation, by Herbert J. Deany, Charles I. Hopkins, Jr., and William F. Bunn, its attorneys, at the close of all the evidence offered on behalf of both parties and moves the Court to instruct the jury to find the defendant not guilty as to paragraph 6 (a), wherein it is charged that the defendant was negligent in failing to use ordinary care to furnish the plaintiff with a reasonable safe place to work and to perform the duties of his employment, and with this motion tenders to the Court,

separately and distinctly from any other instructions in the case, a written instruction in the following form:

"The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6 (a) of the plaintiff's Complaint,"

with the request that the Court mark said instruction "Given" and read the same to the jury.

Herbert J. Deany

Charles I. Hopkins, Jr.

William F. Bunn

Attorneys for Defendant.

236 The Court instructs the jury to find the defendant not guilty of the charge in paragraph 6(a) of the plaintiff's Complaint.

237 And on the same day to wit, on the 23rd day of February, 1955 being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entries, to wit:

238

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * * (Caption—No. 53-C-1687) * * *

This being the day to which this cause was continued for further trial again come the parties by their counsel and the Jury impaneled and sworn herein also come and the trial proceeds and at the close of all the evidence the defendant by its counsel enters herein its motion for a directed verdict and upon due consideration the Court being fully advised in the premises it is

Ordered that said motion be and the same hereby is denied and the trial proceeds and the Jury now having heard all the evidence adduced by the parties, the arguments of counsel and instructions of the Court retire to their rooms with sworn Marshals to consider of their verdict and by agreement of the parties by their counsel it is

Ordered that when the Jury shall have arrived at a verdict they shall sign and seal the verdict, deliver it to the

239 Marshal and separate and polling of the Jurt is waived

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

This day again come the parties by their counsel and the Jury impaneled and sworn herein also come and render their verdict and upon their oath do say:

"We, the Jury, find the defendant guilty and assess the plaintiff damages at the sum of Fifteen thousand Dollars and no cents (\$15,000.00)."
and it is

Ordered that said verdict be filed and that the Jury be and they hereby are discharged from further service herein and it is

Ordered and Adjudged that the plaintiff John W. Webb do have and recover of and from the defendant Illinois Central Railroad Company his damages herein in the sum of fifteen thousand dollars (\$15,000.00), together with the costs and charges in this behalf expended and it is

Further Ordered that the motion for a new trial be and the same hereby is set for hearing on March 11, 1955 at 10:00 A.M.

240 And on the same day to wit, the 23rd day of February, 1955 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

241 * * (Caption—No. 53-C-1687) * *

242 And afterwards on, to wit, the 4th day of March, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

243

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Motion

Now comes the defendant, Illinois Central Railroad Company, by its attorneys, within ten days after the entry of verdict and judgment herein, and pursuant to Rule

50(b) of the Rules of Civil Procedure, moves the Court to set aside said verdict and judgment thereon and to enter judgment in its favor in accordance with its motions for a directed verdict submitted at the close of the plaintiff's case and submitted at the close of all the evidence; or, in the alternative, the defendant prays the Court to grant a new trial herein, and as grounds for the same shows to the Court as follows:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the law and the evidence.
4. The verdict is contrary to the manifest weight of the evidence.

5. The damages awarded by the jury are excessive as a matter of fact.

6. The damages awarded by the jury are excessive as a matter of law.

7. The evidence fails to show that the defendant 244 was guilty of any of the charges of alleged negligence contained in the complaint.

8. The evidence fails to prove the cause of action alleged in the complaint.

9. The Court should have directed a verdict for the defendant at the close of the plaintiff's evidence in accordance with the general motion tendered by the defendant to find the defendant not guilty.

10. The Court should have given to the jury the written instructions to find the defendant not guilty as to each of the several charges of alleged negligence contained in the complaint, which instructions were tendered at the close of the plaintiff's evidence and accompanied by proper written motions requesting that said instructions and each of them be marked "Given."

11. The Court should have directed a verdict for the defendant at the close of all the evidence in accordance with the general motion tendered by the defendant to find the defendant not guilty.

12. The Court should have given to the jury the written instruction to find the defendant not guilty as to the charge of negligence in the complaint, which instruction was tendered at the close of all the evidence and accompanied by proper written motion requesting that said instruction be given and read to the jury.

124 *Motion to Set Aside Verdict and Grant a New Trial.*

13. The Court erred in admitting improper evidence offered by the plaintiff.

14. The Court erred in refusing to admit certain proper evidence offered by the defendant.

15. The Court erred in marking "Given" and reading to the jury each and all of the given instructions tendered on behalf of the plaintiff.

245 16. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered A, which instruction was as follows:

"The jury is instructed that it appears here without dispute that at the time of the accident, both the plaintiff and defendant were engaged in interstate commerce and transportation and, therefore, the rights, duties and liabilities of the parties to this action are governed and controlled solely and exclusively by the Federal Employers' Liability Act of the United States."

17. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered B, which instruction was as follows:

"The Federal Employers' Liability Act of the United States, which is applicable in this case, provides that:

Every common carrier by railroad while engaging in commerce between the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

18. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered C, which instruction was as follows:

"This same law further provides as follows:

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injuries * * * resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

19. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered K, which instruction was as follows:

246 "The Court instructs the jury that in his complaint the plaintiff alleges and charges that on July 2, 1952, he was a member of a train crew employed by the defendant which was engaged in certain switching operations in or near Mount Olive, Illinois; that in the course of his employment he observed a car leaking grain and while going toward a caboose to get some waste material to plug a hole in the bottom of this car, he stopped upon a large clinker which was imbedded in loose cinders and he was caused to lose his footing and injure his left knee; he alleges that at this time and place the defendant was guilty of negligence or unlawful conduct which directly and proximately caused, or directly and proximately contributed to cause, the accident in question and the plaintiff's injuries in that it allegedly failed to use ordinary care to furnish the plaintiff with a reasonably safe place to work and to perform the duties of his employment, and it is charged that as a result of the accident the plaintiff suffered and will continue to suffer severe injuries to his left leg, pain and suffering, and losses of large sums of money.

"The defendant by its answer has denied that it was guilty of any alleged act of negligence as charged by the plaintiff at the time and place in question which proximately caused, or proximately contributed to cause the accident in question, and it alleges that the injuries complained of by plaintiff resulted solely from plaintiff's own negligence, and it denies that it is indebted to the plaintiff in any amount.

"You are instructed that the complaint and answer in this case contain merely and unsworn statements of the parties and neither prove or tend to prove any allegations contained in them."

20. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered M, which instruction was as follows:

"The Court instructs the jury that an employee has a right to assume that his employer has exercised ordinary care with respect to providing him with a reasonably safe place in which to work."

126 *Motion to Set Aside Verdict and Grant a New Trial.*

21. The Court erred in marking "Given" and reading to the jury plaintiff's given instruction lettered O, which instruction was as follows:

"The Court instructs the jury that if, under the evidence and instructions of the Court, you find the defendant guilty and that the plaintiff has sustained damages by reason of physical injury and pain and suffering, if any, by him sustained as a natural, direct and proximate result of being injured in the accident in question, then, to enable the jury to estimate the amount of such damages, if any, caused by physical injuries, pain and suffering, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances proved by the evidence, considering these in connection with their knowledge, observation and experience in ordinary affairs of life."

22. The Court erred in submitting the case to the jury.

23. The evidence shows that the occurrence in question resulted from causes over which the defendant, in the exercise of reasonable care had no control.

24. The evidence shows that plaintiff was guilty of negligence, which was the sole and proximate cause of his injuries.

25. The Court erred in entering judgment for the plaintiff.

26. The Court erred in refusing to enter judgment for the defendant in accordance with its motion to set aside the verdict and judgment and to enter judgment for the defendant.

27. The Court erred in receiving into evidence certain improper evidence offered by the plaintiff.

28. Defendant was prejudiced by improper argument on the part of plaintiff's counsel.

29. The Court erred in making certain improper and prejudicial remarks in the presence of the jury.

30. The facts show that the occurrence in question was an accident which did not result from negligence on the part of the defendant.

31. The verdict of the jury as to both liability and damages is a result of bias and prejudice and indicates the judgment of the jury was overcome by sympathy for the plaintiff.

248 32. And for other good and sufficient reasons appearing in this cause.

Illinois Central Railroad Company

Herbert J. Deany

Charles I. Hopkins, Jr.

William F. Bunn

Attorneys for Defendant

By Charles I. Hopkins, Jr.

An attorney of record

Received a Copy of the above
and foregoing Motions this 4th
day of March, A. D. 1955.

Robert J. Rafferty

Attorney for Plaintiff

By /s/ Mary McDonald

249 And afterwards, to wit, on the 11th day of March,
1955 being one of the days of the regular March term
of said Court, in the record of proceedings thereof, in
said entitled cause, before the Honorable Philip L. Sullivan
District Judge, appears the following entry, to
wit:

250

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

This cause coming on for hearing on the motion of the
defendant for a new trial, etc., come the parties by their
counsel and on motion of the defendant by its counsel it is

Ordered that leave be and hereby is granted to the de-
fendant to withdraw Point 29 from his motion for a new
trial, etc., and the Court now having heard the arguments
of counsel it is

Further Ordered that the plaintiff shall present an
order on March 14, 1955 at 10:00 A.M. pursuant to the
Court's ruling

251 And afterwards, to wit, on the 14th day of March,
1955 being one of the days of the regular March term
of said Court, in the record of proceedings thereof, in said
entitled cause, before the Honorable Philip L. Sullivan
District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Order

This cause this day coming on to be heard on the motions of the defendant after verdict and judgment herein, and the Court having considered said motions and heard the arguments of counsel, and being fully advised in the premises;

It is, therefore, ordered that the motions of the defendant to set aside the verdict and judgment thereon and to enter judgment in its favor in accordance with its motions for a directed verdict submitted at the close of the plaintiff's case and submitted at the close of all of the evidence, and the defendant's motion for a new trial herein be and the same are hereby overruled and denied.

Enter: /s/ *Philip L. Sullivan,*

March 14, 1955

Judge

And afterwards on, to wit, the 7th day of April, 1955 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice Of Appeal (Clerk's Certificate Of Mailing Attached Thereto), in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

NOTICE OF APPEAL

Notice is hereby given that the Illinois Central Railroad Company, a corporation, defendant appellant, hereby appeals to the Court of Appeals for the Seventh Circuit from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, heretofore made and entered in this cause on the 23rd day of February, A.D. 1955; and from the final order of said Court heretofore made and entered in this cause on the 14th day of March, A.D. 1955, overruling the defendant appellant's motion for judgment in its favor,

in accordance with Rule 50(b) of the Federal Rules of Civil Procedure, and overruling said defendant-appellant's alternative motion for a new trial.

Illinois Central Railroad
By Herbert J. Deany
Robert S. Kirby
William F. Bunn

Its Attorneys

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Certificate of Mailing

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on April 7, 1955, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Robert J. Rafferty
30 North La Salle Street
Ra-6-1892
Chicago, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 7th day of April, 1955.

Roy H. Johnson

Clerk

(Seal) By Gizella Buther

Deputy Clerk

And afterwards, to wit, on the 11th day of April, 1955; being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Order

On motion of the attorneys for defendant/appellant Illinois Central Railroad Company, a Stipulation as to Supersedeas Bond to be Filed herein having been

filed and the Court being fully advised in the premises:

Therefore, it is Ordered and Adjudged that defendant-appellant Illinois Central Railroad Company be allowed ten (10) days within which to file a supersedeas bond in the amount of Seventeen Thousand Dollars (\$17,000.00), and that the defendant appellant deposit with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, Seventeen Thousand Dollars (\$17,000.00) of face value of United States Treasury Bonds as surety for said supersedeas bond in lieu of a signatory surety for said supersedeas bond, said United States Treasury Bonds to be 2-3/8%, due June 15, 1958, and bearer in form; the supersedeas bond in the usual form to be executed and filed by defendant appellant.

It is Further Ordered and Adjudged that the receipt of the Clerk of this Court that he has received from defendant appellant the United States Treasury Bonds shall be attached to and made a part of the supersedeas bond to be executed by defendant appellant.

It is Further Ordered and Adjudged that execution 258 in this suit be stayed pending the hearing and determination of the appeal herein and the coming down to this Court of the mandate of the United States Court of Appeals for the Seventh Circuit, upon the filing by the defendant appellant of the supersedeas bond for Seventeen Thousand Dollars (\$17,000.00), with the attached receipt of the Clerk of this Court for the deposit of the Seventeen Thousand Dollars (\$17,000.00) of face value of United States Treasury Bonds, as hereinbefore ordered.

Enter:

John P. Barnes

Judge

Dated: April 11, 1955.

And afterwards on, to wit, the 13th day of April, 259 1955 came the Plaintiff-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Appearance in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—N 53-C-1687) * *

Notice of Appearance

Notice is hereby given that the name of the Appellee

260 in the subject case is John W. Webb; that the name and address of his attorney is Robert J. Rafferty, 30 North LaSalle Street, Chicago 2, Illinois.

Robert J. Rafferty
Attorney for Plaintiff Appellee,
John W. Webb

Received a copy of the above
Notice of Appearance this 12th
day of April, 1955.

Herbert J. Deany
Robert S. Kirby (Signed)
William F. Bunn

Attorneys for Defendant, Appellant

And afterwards on, to wit, the 15th day of April, 261 1955 there was filed in the Clerk's office of said Court a certain Supersedeas Bond in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Supersedeas Bond

Know all Men by These Presents, that the Illinois 262 Central Railroad Company, a corporation, and United States Treasury Bonds at the face value of Seventeen Thousand Dollars (\$17,000.00) payable to bearer and deposited with the Clerk of this Court pursuant to order of this Court, to be held and deposited as security to this Bond, subject to the terms and conditions as hereinafter set forth, are held and firmly bound unto John W. Webb in the sum of Seventeen Thousand Dollars (\$17,000.00), for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally and firmly by these presents.

Witness its hand and seal this 15th day of April, A.D. 1955.

Whereas, on the 23rd day of February, 1955, a judgment in the sum of Fifteen Thousand Dollars (\$15,000.00) was rendered in the above-entitled action in favor of the above-named obligee, and the said Illinois Central Railroad Company, a corporation, has duly filed a notice of appeal from

said judgment to the United States Court of Appeals for the Seventh Circuit; and

Whereas, the said Illinois Central Railroad Company, a corporation, desires a stay of all proceedings in the above-entitled cause until the determination of the said appeal.

Now, Therefore, the condition of this bond is such that if the said Illinois Central Railroad Company, a corporation, as appellant, shall prosecute its appeal with effect and shall satisfy the said judgment in full, together with costs, interests and damage for said delay if said appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and costs, interest and damage as may be adjudged and awarded by the Court of Appeals for the Seventh Circuit, then this obligation to be void, otherwise to remain in full force and effect.

Illinois Central Railroad Company,
a Corporation, (Principal)

(Seal)

By J. H. Wright
Vice President

Attest:

A. B. Huttig
Assistant Secretary

Approved: April 15, 1955

John P. Barnes

Judge

State of Illinois }
County of Cook } ss

I, Olive O'Reilly, a Notary Public, in and for said County in the State aforesaid, do hereby certify that

J. H. Wright is personally known to me to be Vice President of the Illinois Central Railroad Company, a corporation, and A. B. Huttig is personally known to me to be the Assistant Secretary of said corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, and they appeared before me this day in person and severally acknowledged that as such Vice President and Assistant Secretary, they signed and delivered the said instrument as Vice President and Assistant Secretary of said corpora-

tion and caused the corporate seal of said corporation to be affixed thereto, as their free and voluntary act, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 15th day of April, A.D. 1955.

(Seal)

Olive O'Reilly
Notary Public

Received a Copy of the foregoing document this 15th day of April, A. D. 1955.

Robert Rafferty (Signed)
Attorney for Plaintiff-Appellée

Received the following list of securities this 15th 265 day of April, A.D. 1955, at Chicago, Illinois, being 2-3/8% United States Treasury Bonds, with maturity date of June 15, 1958, and payable to bearer:

72447 for \$10,000.00 with coupons 6 to 12 incl.

14875 for \$ 5,000.00 with coupons 6 to 12 incl.

30198 for \$ 1,000.00 with coupons 6 to 12 incl.

30199 for \$ 1,000.00 with coupons 6 to 12 incl.

held as security to the attached Bond pursuant to order of the United States District Court for the Northern District of Illinois, Eastern Division, heretofore entered in said cause

Roy H. Johnson
Clerk of the United States District Court, Northern District of Illinois, Eastern Division

And on the same day to wit, on the 15th day of 266 April, 1955, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* *) (Caption—No. 53-C-1687)

It Is Ordered by the Court that supersedeas bond 267 in the sum of Seventeen Thousand Dollars (\$17,000.00) be and the same hereby is approved

And afterwards on, to wit, the 18th day of April, 1955 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points And Designation Of Record in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Statement of Points

Defendant-Appellant above named states that the points on which it intends to rely on this appeal are as follows:

1. The court erred in submitting the case to the jury.
2. The court erred in giving certain instructions on behalf of plaintiff.
3. The court erred in holding that there was any evidence reasonably tending to prove any of the charges of negligence.
4. The court erred in holding that there was any evidence reasonably tending to show that the negligence charged was the proximate cause of the injury complained of.
5. The court erred in failing to grant a remittitur because of the excessive amount of the verdict.
6. The court erred in failing to grant a remittitur because the record shows that the plaintiff was guilty of contributory negligence as a matter of law.
7. The court erred in submitting the case to the jury because the record shows that the sole proximate cause of plaintiff's injury was his own negligence.
- 270 8. The court erred in entering the judgment against defendant.

Illinois Central Railroad Company

Herbert J. Deany

Robert S. Kirby

William F. Bunn

Attorneys for Defendant Appellant

135 East Eleventh Place

Chicago 5, Illinois

WAbash 2-4811

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 53-C-1687) * *

Designation of Record

To the Clerk of the United States District Court for
271 the Northern District of Illinois, Eastern Division:

Pursuant to Rule 75(a) of the Federal Rules of
Civil Procedure, defendant-appellant designates the follow-
ing portions of the record to be contained in the record on
appeal in the above-entitled action to the United States
Court of Appeals for the Seventh Circuit:

1. Complaint.
2. Defendant's answer to complaint.
3. Transcript of all of the testimony offered on behalf
of plaintiff and defendant, a copy of which is filed
herewith.
4. All stipulations of the parties which were read into
the record on the trial.
5. Defendant's general motion for a directed verdict
of not guilty and separate motions for a directed
verdict for defendant as to the four respective
charges in the complaint, presented and filed by de-
fendant at the close of all the evidence offered on
behalf of plaintiff.
- 272 6. Order of February 21, 1955, overruling defendant's
motions for a directed verdict as to the four re-
spective charges, entered at the close of all the
evidence offered on behalf of plaintiff.
7. Defendant's general motion for a directed verdict
of not guilty and separate motion for a directed
verdict as to paragraph 6(a) of the complaint pre-
sented and filed by defendant at the close of all the
evidence offered on behalf of both parties.
8. Order of February 23, 1955, overruling defendant's
general motion for a directed verdict and separate
motion for a directed verdict as to paragraph 6(a)
of the complaint, entered at the close of all the
evidence offered on behalf of both parties.
9. Transcript of argument of counsel and rulings of
the court on defendant's motions presented at the
close of plaintiff's evidence.

10. Transcript of argument of counsel and rulings of the court on defendant's motions presented at the close of all the evidence offered on behalf of both parties.
11. Certificate of court reporter.
12. Plaintiff's Exhibits 1 and 2.
13. Defendant's Exhibits 1 through 4, inclusive.
14. Instructions to the jury.
15. Transcript of argument of defendant's counsel on its objections to instructions tendered by plaintiff and given by the court.
16. Verdict of the jury filed February 23, 1955.
17. Judgment on the verdict entered February 23, 1955.
18. Motion of defendant for judgment in its favor, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure or, in the alternative, for a new trial, filed March 4, 1955.
19. Order of March 14, 1955, denying defendant's motion for judgment in its favor and its motion, in the alternative, for a new trial.
20. Notice of appeal filed April 7, 1955.
21. Certificate of mailing notice of appeal.
22. Order approving supersedeas bond in the amount of \$17,000.
23. Supersedeas bond filed.
24. Statement of points on which defendant-appellant intends to rely.
25. This designation.
26. All notices given, motions made and orders entered after the date of the filing hereof.

Herbert J. Deany

Robert S. Kirby

William F. Bunn

Attorneys for Defendant-Appellant

135 East Eleventh Place

Chicago 5, Illinois

Telephone: WAbash 2-4811

Received a copy of the above and foregoing designation of record together with a copy of the statement of points on which defendant-appellant intends to rely, this 18th day of April, A.D. 1955.

(Signed) Robert Rafferty

Attorneys for Plaintiff-Appellee

30 North LaSalle Street

Chicago, Illinois

And on the same day to wit, the 18th day of April, 274 1955 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Notice Re Filing Of Supersedeas Bond in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 53 C-1687)

Notice

To: Robert J. Rafferty

Attorney for Plaintiff Appellee

30 North LaSalle Street

Chicago 2, Illinois

Pursuant to the local rules of civil procedure of the 275 United States District Court for the Northern District of Illinois, Eastern Division, this notice is being served upon you to advise you that on Friday, April 15, 1955, the Illinois Central Railroad Company, Defendant Appellant, filed with the Clerk of the aforementioned court a Supersedeas Bond in the amount of \$17,000.00, a copy of which has been heretofore served upon you.

Illinois Central Railroad Company

H. J. Deany

R. S. Kirby

W. F. Bunn

Attorneys for Defendant Appellant

135 East Eleventh Place

Chicago 5, Illinois

WAbash 2-4811

Received a copy of the foregoing notice this 18th day of April, 1955.

(Signed) Robert Rafferty

Attorney for Plaintiff Appellee

And afterwards on, to wit, the 25th day of April, 276 1955 came the Plaintiff-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Record in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 53 C 1687)

Designation of Record by Plaintiff-Appellee

277 To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, plaintiff-appellee designates the following portions of the record to be contained in the record on appeal in the above entitled action to the United States Court of Appeals for the Seventh Circuit:

1. Transcript of opening statement to the jury by counsel for defendant-appellant.
2. Entry of appearance of plaintiff-appellee on appeal.
3. This designation.

(Signed) Robert Rafferty

Attorney for Plaintiff-Appellee

30 North LaSalle Street

Chicago 2, Illinois

Randolph 6-1892

State of Illinois }
County of Cook } ss

Robert J. Rafferty, being first duly sworn on oath, 278 deposes and says that he served a copy of the above and foregoing designation of record upon Herbert J. Deany, Robert S. Kirby and William F. Bunn, attorneys for defendant-appellant, by mailing a copy thereof to said attorneys in a correctly addressed, sealed, postage fully pre-paid envelope, which envelope with enclosure was deposited in the United States Mail on April 25, 1955.

(Signed). Robert J. Rafferty

Subscribed and Sworn to before me
this 25th day of April, 1955.

Mary Conrad, *Notary Public*.

And afterwards on, to wit, the 10th day of May, 279 1955 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Stipulation

It is stipulated between the parties herein that the 280 original exhibits introduced on the trial of this cause may be transmitted to the Court of Appeals, in lieu of the reproduction of the said exhibits as a part of the printed record on appeal.

Plaintiff's exhibit 1 is a schedule of pay increases identified on page 65 and admitted on pages 149 and 162; plaintiff's exhibit 2 is a statement of the plaintiff identified on page 106 and admitted on page 107.

Defendant's exhibit 1 is a photograph identified and admitted on page 70; defendant's exhibits 2, 3, and 4 are hospital and doctor bills identified and admitted on page 147.

Said exhibits shall be transmitted by the clerk of this court to the Court of Appeals for the Seventh Circuit, with the record on appeal in this cause, and when the appeal in this cause has been heard and determined, said exhibits shall be returned to the clerk of this court by 281 the clerk of the Court of Appeals, Seventh Circuit.

Dated May, 1955.

(Signed) Robert Rafferty

Attorney for Plaintiff-Appellee

(Signed) William F. Bunn

Attorneys for Defendant Appellant

Approved: .

United States District Judge

And on the same day to wit, on the 10th day of May, 282 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 53 C 1687) * *

Order

It appearing to the court from the nature and 283 character of the exhibits in this cause that the original of said exhibits should be transmitted to the United

States Court of Appeals for the Seventh Circuit as a part of the record on appeal herein, it is ordered, in accordance with the stipulation of the above-named parties, that the clerk of the above-entitled court be and he is hereby authorized and directed to withdraw from the files in his office and to transmit to the clerk of said Appellate Court with and as a part of the record on appeal in said cause, all said original exhibits, and said original exhibits need not be copied in the said record on appeal.

The above stipulation of the parties is all other respects confirmed and approved and in accordance with said stipulation it is so ordered.

Enter:

(Signed)

Philip L. Sullivan

United States District Judge

Dated May 10th, 1955.

Northern District of Illinois }
United States of America } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: *John W. Webb*, Plaintiff, v. *Illinois Central Railroad Company*, a corporation, Defendant, No. 53 C 1687, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the original exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 16th day of May, 1955.

(Signed) Roy H. Johnson

Clerk

(Signed) By Gizella Butcher

Deputy Clerk

[fol. 285] IN THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT, OCTOBER TERM AND SESSION, 1955

No. 11462

JOHN W. WEBB, Plaintiff-Appellee,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

OPINION—December 29, 1955

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges*.

LINDLEY, Circuit Judge. This is an action under the Federal Employer's Liability Act, 45 U. S. C. §§ 51 *et seq.*, to recover damages for personal injuries sustained by plaintiff in the course of his employment as a brakeman by defendant, resulting, as he averred, from the negligence of defendant in failing to provide him with a reasonably safe place in which to work. Defendant's motions for a directed verdict made at the close of plaintiff's evidence and at the close of all the evidence were denied, as was its alternative motion for a new trial. It appeals from the judgment entered on the verdict in favor of plaintiff, assigning as error the trial court's action in overruling its motions and in giving certain instructions.

Plaintiff had been employed by defendant in various capacities since about 1925 and was, on July 2, 1952, when the accident occurred, working as a brakeman, being assigned to the crew of a local freight run between the cities of East St. Louis and Clinton, Illinois. During the course of his duties, in a switching operation at Mount Olive, he noticed that a wheat car in the train was leaking. While the other crew members continued with the task of picking [fol. 286] up cars to be incorporated into the train, he started back to the caboose to get some waste to plug the hole in the leaking car. He turned and, on the first step he took, tripped and fell with his left leg buckled under him. He thereby sustained a serious injury to his left knee-cap.

The accident occurred on the roadbed of defendant's "house track" at a point about one foot from the end of the ties. After plaintiff fell, he looked to see what had caused him to fall and saw a clinker "about the size of my fist" which was partly out of the ground, and a hole beside the clinker. He picked up the offending object and tossed it aside, proceeded to the caboose, procured some waste and plugged the hole in the leaking car. Plaintiff stated that he looked "at the ground" before he stepped but did not see the clinker. He stated further that the footing on the roadbed looked level but was a little soft.

The principal question presented is whether the court correctly ruled that there was sufficient evidence of negligence to require denial of defendant's motions for a directed verdict and submission of the cause to a jury.

Plaintiff's testimony that his injury was caused by his stepping on a clinker is not contradicted. We shall assume, for the purpose of this decision, that such an object on or in the roadbed constituted a hazard to defendant's employees. But to prevail, it was incumbent on plaintiff to adduce evidence that this hazardous condition was produced or was permitted to continue by reason of defendant's negligence. *Moore v. Chesapeake & O. Ry. Co.*, 340 U. S. 573; *Eckenrode v. Pennsylvania R. Co.*, 164 F. 2d 996, aff'd 335 U. S. 329 (C. A. 3); *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7; *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658. Fault or negligence may not be inferred from the mere existence of the clinker and the happening of the accident. *Delaware, L. & W. R. Co. v. Koske*, *supra*; *Patton v. Texas & P. Ry. Co.*, *supra*. The employer is not an insurer that the work place be absolutely safe, but is chargeable only with the duty of exercising reasonable care and diligence to see that the place where work is to be performed is reasonably safe for its workmen. *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492; *Delaware, L. & W. R. Co. v. Koske*, *supra*; *Patton v. Texas & P. Ry. Co.*, *supra*. Applying these governing principles, we believe the trial court erred in denying defendant's motions for a directed [Vol. 287] verdict. The evidence, viewed in the light most favorable to plaintiff, supports the following fact statement. He sustained a serious injury when he stumbled over

an unusually large clinker which was embedded, partially at least, in defendant's roadbed. At the point where the accident occurred defendant maintains its mainline track which runs in a north-south direction. Parallel to, and east of, that track, defendant maintains a second track which is referred to in the record as the passing track. The latter is connected to the mainline by switches and a cross-over track. Ingress to the passing track is gained over a switch, known as the "house track" switch. The section of the passing track south of the switch is known as the house track. East of these installations and connected thereto by switches and a cross-over track, are certain facilities of the L. & N. Railroad consisting of its mainline and house tracks. Plaintiff was standing on the roadbed of defendant's house track approximately twenty feet south of the switch when he noticed the leaking condition of the wheat car. The accident occurred at that spot when he turned toward the caboose and took one step. He was regularly employed on the East Saint Louis-Clinton local and worked frequently at this locale. He did not see the clinker before he fell; during cross-examination of plaintiff, the trial judge characterized his testimony as to his knowledge whether, before the accident, the clinker was completely buried in the roadbed in the following language, "It is self-evident that he does not know, if he did not see it." The physical set-up of defendant's house track had been altered in June, 1952, when the level of the house track switch had been raised five inches. In this operation the ties and rails were raised and sufficient ballast in the form of fine cinders and crushed stone was employed to raise the switch to the required level and the grade of the connecting rails to a compensating elevation. There was no direct testimony that this operation affected the roadbed at the point where the accident occurred, i.e., twenty feet south of the switch, but, for purposes of this opinion, we assume that it was affected. Some fifteen cubic yards of ballast were required to accomplish the end result. Further weight is afforded to our assumption by plaintiff's testimony that the footing at that place was level but a little soft. Three different employees testified that they periodically inspected the trackage at this location for defects in the facilities and

[fol. 288] hazards existing thereon or nearby. One of these witnesses testified that he had, occasionally, discovered large clinkers in the ballast in his territory and had caused them to be removed. Subsequent questioning of the witness elicited the testimony that the "territory" to which reference is made included more than forty miles of defendant's right of way and mainline. There was no testimony as to conditions at the scene of the accident either before or after the occurrence except plaintiff's testimony that he stumbled over an unusually large clinker which caused his injury.

To make a submissible case it was incumbent on plaintiff to adduce substantial evidence that defendant either negligently placed the clinker in the ballast or was chargeable with notice, either actual or constructive, of its presence therein. *Bevan v. New York, C. & St. L. R. Co.*, 132 Ohio St. 245, 6 N. E. 2d 982. We think his proof fails in this respect. There is no evidence as to the agency whereby the hazard was placed in or on the roadbed. Defendant's lines are in close proximity to and are connected with those of the L. & N. Plaintiff testified that the facilities of the two roads were connected to permit the interchange of freight cars between them. A photographic exhibit which, according to plaintiff's testimony, substantially represents the conditions at the scene of the accident, reveals several buildings in the near vicinity; there is no evidence to show whether these are the property of defendant or of the L. & N. or of some other stranger to the occurrence. The right of way is not fenced, and is, therefore, accessible to the public; there is no evidence as to whether or not the premises are frequented by strangers. There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation.

Furthermore, were we to hold that it was proper to permit the jury so to speculate, plaintiff still would not be entitled to recovery unless it was allowed also to speculate that it is negligence per se to allow such an object to become mixed in with the fine ballast used in improving its roadbed. Defendant's duty to plaintiff in this respect

was to exercise the care of a reasonably prudent person, [fol. 289] under the existing circumstances, to prohibit the introduction of a hazard into the roadbed where plaintiff was required to work. Cf. *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492; *Missouri Pacific R. Co. v. Zolliecoffer*, 191 S. W. 2d 587, 588 (Ark.). Not only is there no evidence that defendant violated that duty, but also, there is a total want of evidence as to what constitutes reasonable prudence under the proved circumstances.

The record is equally lacking in evidence to prove that defendant had actual or constructive notice of the dangerous condition. The testimony as to actual notice is that no one, plaintiff included, knew of the presence of the clinker until the accident occurred. There is substantial undisputed evidence that this portion of defendant's right of way was inspected frequently, with a purpose which included the seeking out and removal of such hazards. The evidence is silent as to what standard of care plaintiff was entitled to expect and to rely upon. There is no evidence that defendant was remiss in any respect. There is no proof that its inspection of its premises did not meet the required standard, or that a closer, more thorough, inspection would have disclosed the existence of this hazardous situation.

Plaintiff having failed in his burden of proof, it was error to submit the case to the jury and permit it to reach a verdict by pure speculation. The situation is not unlike that disclosed in *Kaminski v. Chicago River & I. R. Co.*, 200 F. 2d 1 (C. A.-7). Kaminski, while working in the course of his employment on the premises of a customer of the defendant railroad, was seriously injured when he fell into a hole beside an industry track. We found that there was no evidence as to when and through what agency the hazardous condition was created or as to the railroad's notice, either actual or constructive, of its existence, and held that the trial court erred in overruling the railroad's motion for a directed verdict. A comparable holding is found in numerous cases involving factually similar situations. See *o.g.*, *O'Mara v. Pennsylvania R. Co.*, 95 F. 2d 762 (C. A.-6); *Beran v. New York, C. & St. L. R. Co.*, 132 Ohio St. 245, 6 N. E. 2d 982; *Spencer v. Atchison, T. & S. F. Ry. Co.*, 207 P. 2d 126 (Cal. App); *Waller v Northern*

Pacific Terminal Co., 166 P. 2d 488 (Ore.), *Matthews v. Southern Pacific Co.*, 59 P. 2d 220 (Cal. App.).

The cases on which plaintiff relies are largely inapposite. [fol. 290] In each there was evidence from which the jury might reasonably infer that the defendant either negligently created the dangerous agency involved, or was chargeable with notice of the existence of a condition which rendered unsafe the place where the injured employee was required to work. *Eg.*, *Brown v. Western Ry. of Alabama*, 338 U. S. 294; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, aff'ing, 16 Ga. App. 551, 85 S. E. 809; *Fleming v. Kellett*, 167 F. 2d 263 (C. A.-10); *Waddell v. Chicago & E. I. R. Co.*, 142 F. 2d 309 (C. R.-7); *Pitcairn v. Hunault*, 86 F. 2d 664 (C. A.-7); *Virginian Ry. Co. v. Staton*, 84 F. 2d 133 (C. A.-4); *Smith v. Schumaker*, 85 P. 2d 967, cert. denied 307 U. S. 646 (Cal. App.); *Missouri Pacific R. Co. v. Zolliecoffer*, 191 S. W. 2d 587 (Ark.); *Tash v. St. Louis-S. F. Ry. Co.*, 76 S. W. 2d 690 (Mo.); *McClain v. Charleston & W. C. Ry. Co.*, 4 S. E. 2d 280 (S. C.); *Lock v. Chicago, B. & Q. R. Co.*, 219 S. W. 919 (Mo.); *Holloway v. Missouri, K. & T. Ry. Co.*, 208 S. W. 27 (Mo.). The only case cited which purports to justify an inference of negligence merely from the existence of an obstruction and the happening of the accident is *Marcades v. New Orleans Terminal Co.*, 111 F. Supp. 650. The case was tried by the court without a jury and the evidence is not reported. Insofar, however, as that decision imposes liability merely because of the existence of a hazard without any evidence as to defendant's notice, it rests upon a theory of liability without fault and cannot be reconciled with pronouncements by the Supreme Court that the Act does not make railroads insurers of employee safety. *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492.

Since we are of the opinion that defendant's motions for a directed verdict should have been allowed, we find it unnecessary to consider other assignments of error. The judgment is reversed and the cause remanded to the District Court with directions to enter judgment for defendant.

[fol. 291] UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Before Hon. J. Earl Major, Circuit Judge, Hon. Walter C. Lindley, Circuit Judge, Hon. H. Nathan Swain, Circuit Judge.

No. 11462

JOHN W. WEBB, Plaintiff-Appellee

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

JUDGMENT—December 29, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby remanded to the said District Court with directions to enter judgment for the Defendant.

[fol. 292] UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—January 30, 1956

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

[fol. 293] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 294] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI. Filed April 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9137-1)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~741~~ HJ

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

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Chicago, Illinois,
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. _____

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

**JUDGMENT AND OPINION OF THE COURTS
BELOW.**

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered February 23, 1955, and is not reported but is printed in the record filed with the clerk of the Court of Appeals below. (R. 122)

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing said judgment, was filed December 29, 1955, and is not yet reported but is set forth in the Appendix hereto. (App. A.)

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Date of Judgment to be reviewed, December 29, 1955, (App. B), as amended by order denying rehearing January 30, 1956 (App. C).

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1) (App. D).

QUESTIONS PRESENTED FOR REVIEW.

Question I.

In order to prevail under the Federal Employers' Liability Act, need a plaintiff negate all possible inferences of negligence of persons other than the defendant and prove his case by a standard of "probabilities"?

Question II.

Does a Court of Appeals invade the province of a jury and violate the scope of appellate review in a Federal Employers' Liability Act case by setting aside an employee's jury verdict and judgment and directing entry of final judgment for the railroad when the record shows that:

The employee stepped on a large clinker buried near a switch stand in a soft, new roadbed constructed by the railroad about three weeks before the accident; the railroad's firemen cleaned their fireboxes at this location; the employee's duties required him to work on the ground at this point and the employee and the employer's witnesses testified that a clinker as described made for bad footing and an unsafe place to work?

STATUTES INVOLVED.

28 U. S. Code, Sec. 1254 (1), Appendix D.

45 U. S. Code, Sec. 51, Appendix E.

45 U. S. Code, Sec. 56, Appendix F.

STATEMENT OF THE CASE.

(A)

The Material Facts.

This action was brought by Petitioner, a brakeman in the employ of Respondent, under the Federal Employers' Liability Act, 45 U. S. Code, Secs. 51-60, to recover damages for injuries suffered as a result of the alleged negligence of his employer. (R. 3-5)

Around the middle of June, 1952, extensive repairs had been made by Respondent on its house track at Mount Olive, Illinois. (R. 68) This work included raising the rail and ties about 5 inches above their previous level and the use of about 15 cubic yards of new cinder and chat ballast. (R. 72, 73) During the repairs, the house track was closed for use by the trainmen. (R. 67)

About three weeks after the repair work (July 2, 1952) when uncoupling a car on this house track, Petitioner observed a leaking grain car. He turned around to go to the caboose to get some waste to use as a plug and stepped on a large buried clinker. He had looked at the ground before stepping and it was level, looked like good footing outside of being a little loose. (R. 43) When he stepped on the clinker his foot turned, he was thrown off balance and his leg doubled under him and he sustained injuries. (R. 14) After the accident he saw the clinker

with a hole right by its side. (R. 44) It was partially kicked out of the cinders. (R. 61) It was about the size of his fist. (R. 14)

Petitioner, a man with 25 years railroad experience and a former section hand, testified that it is not a customary practice to use clinkers the size of a man's fist in a railroad road bed. They don't pack down and give good footing. (R. 44) Lester Rector, defendant's section foreman, who had charge of the Mount Olive track raising and new ballasting, said that such a large clinker would not belong in a road bed near a switch stand. (R. 77) John Brosnahan, defendant's track supervisor, testified that one purpose of ballast is to provide safe footing for trainmen. He stated that the presence of a clinker as described and located would represent an unsafe place to work. (R. 87) The cinders were not screened before being used in the new roadbed. (R. 77) The site of the accident was the only place for Respondent's firemen to clean their fire boxes at Mount Olive. (R. 59)

Webb's statement taken by Respondent's claim agent was admitted in by agreement. It states in part:

"I took one step and stepped on a cinder buried in the loose cinders about a foot from the end of the ties. When I stepped on this cinder it threw me off balance, caused me to fall and I injured my left knee as I fell. This happened about 15 feet south of the house track switch on the east side of the house track. This track had been worked on shortly before this by the trackmen and the cinders were stirred up and loose and this large cinder about six inches in circumference was buried in the loose cinders around it so that it was not discernible from the rest of the small loose cinders. It looked like the surface was level and good enough footing but this cinder being solid in the loose cinders caused my foot to turn as I

stepped on it, turned my foot and caused me to fall so that I injured the cartilage in my knee as I fell."
(R. 110)

The applicable statute (45 U.S.C. 51) provides:

"Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting * * * by reason of any defect or insufficiency due to its negligence in its * * * track, roadbed * * * or other equipment."

The plaintiff in his complaint charged that defendant failed to use ordinary care to furnish him with a reasonably safe place to work.

The jury returned a verdict for petitioner in the sum of \$15,000.00. Judgment was entered on the verdict.

Motions for new trial and for judgment notwithstanding the verdict were denied. (R. 128). On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment and remanded the case to the District Court with directions to enter judgment for respondent. (App. B) Petition for rehearing was denied (App. C).

(B)

Basis for Federal Jurisdiction in District Court.

Jurisdiction in the District Court, the court of first instance, was based upon the provisions of 45 U. S. Code, Section 56. (App. F)

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment to the Constitution of the United States.

In recent years this Court has, on many occasions, expressed itself clearly regarding the respective functions of the Court and jury, and the scope of appellate review in cases arising under the Federal Employers' Liability Act.

These decisions include *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1942); *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350 (1942); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600 (1944); *Lavender v. Kurn*, 327 U.S. 645 (1945); *Ellis v. Union P. R. Co.*, 329 U.S. 649 (1947); *Myers v. Reading R. Co.*, 331 U.S. 477 (1947); *Wilkerson v. McCarthy*, 336 U.S. 53 (1948) and *Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407 (1953).

The decision herein complained of is in direct conflict with the foregoing cases on the authority of the jury to draw permissible inferences from the evidence and the right of an Appellate Court to substitute its interpretation of the evidence for the verdict of the jury and the judgment of the trial court.

The conclusion of the Court of Appeals is bottomed on its statement that "there is no evidence as to the agency whereby the hazard was placed in or on the road-bed." (Opinion, App. p. 14)

Following this assertion, the Court of Appeals notes that strangers may frequent the premises and that the line of another railroad is in close proximity to the scene of the accident.

The Court then says that a finding that the defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation can rest on nothing but speculation. (Opinion, App. p. 15)

The Appellate Court infers that a stranger or another railroad could have gone on to defendant's right of way and buried a clinker therein and dismisses the probative evidence of a major repair job (using 15 cubic yards of unscreened cinders and chat) on the railroad done by its own employees three weeks before the accident and an injury caused by a clinker buried in a roadbed which was still soft from new ballast installation.

The Court of Appeals by weighing the evidence and searching the record for conflicting circumstantial evidence has violated the clear mandate of this Court and deprived petitioner of his right of trial by jury. Excerpts from several of the cases construing the F.E.L.A. cited on page 6 demonstrate this to be true.

In *Ellis v. Union P. R. Co.*, 329 U.S. 649, (1947) this Court said at page 653:

"Once there is a reasonable basis in the record for concluding there was negligence which caused the injury, it is irrelevant that fair minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

Lavender v. Kurn, 327 U.S. 645, (1945), holds at page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part

of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

In *Wilkerson v. McCarthy*, 336 U.S. 53 (1948), this Court stated at page 63:

"In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence. * * * For these reasons, the trial court should have submitted the case to the jury. * * *"

In a concurring opinion it is said at page 70:

"The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

Or as said in *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, (1942) at page 354:

"To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

2. The decision herein is not in accord with the applicable decisions of this Court.

The decision of the Court below is in conflict with the holdings of this Court in *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949) and *Southern Ry. Co. v. Puckett*, 244 U.S. 571, (1917).

These are the only two cases ever decided by this Court involving railroad employees injured by clinkers in or

on the railroad right of way. They are dismissed by the Court of Appeals as "inapposite." (Opinion, App., page 16)

3. **The Opinion of the Court below sets forth a standard of proof which is in conflict with the decisions of this Court and its own prior decision.**

The opinion of the Court of Appeals says:

"There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation."

(Opinion, App., page 15)

This part of the opinion is in conflict with the opinion of the same Court of Appeals in *Spotts v. Baltimore and Ohio R. Co.*, (1939) 102 F. (2d) 160, a case involving the efficiency of a railroad car brake, where the Court says at page 162:

"In other words, we cannot say as a matter of law that any and all inferences which the jury might reasonably draw from the evidence would support only a verdict for defendant and not for plaintiff. Nor can we say that, as a matter of law, the contradictory evidence offered by defendant shows that plaintiff's testimony cannot be true. A contention for such action is an appeal to us to weigh the conflicting evidence in the light of probabilities and thus to invade the exclusive province of the jury, and, on an application for a new trial, of the trial judge. This we may not do."

This Court in *Myers v. Reading R. Co.*, 331 U.S. 477, 483 (1947) approved the rule in the *Spotts* case and quoted it.

The cases listed on page 6 hereof clearly enunciate this Court's opinion on quantum of proof and the duties and limitations of jurors, trial judges and Courts of Appeal. They set forth in clear, forthright and unmistakable language that if there is any evidence in the record, standing alone and by itself, from which a reasonable inference of negligence may be drawn, the jury must decide the case and its verdict should not be disturbed. None of these cases requires, that "probabilities be deduced from the evidence," as does the Court of Appeals in the opinion complained of.

The opinion and judgment of the Court below, if permitted to stand, will result in prejudice to the substantial rights of petitioner and to other persons whose cases might be decided in a similar fashion, contrary to the decisions of this Court.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

CARL L. YAEGER,
Attorney for Petitioner.

— ROBERT J. RAFFERTY,
Of Counsel.

APPENDIX A

**Opinion, United States Court of Appeals
For the Seventh Circuit.**

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11462

OCTOBER TERM AND SESSION, 1955.

JOHN W. WEBB,
Plaintiff-Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COM-
PANY,
Defendant-Appellant.

} Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

December 29, 1955.

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* This is an action under the Federal Employer's Liability Act, 45 U. S. C. §§ 51 *et seq.*, to recover damages for personal injuries sustained by plaintiff in the course of his employment as a brakeman by defendant, resulting, as he averred, from the negligence of defendant in failing to provide him with a reasonably safe place in which to work. Defendant's motions for a directed verdict made at the close of plaintiff's evidence and at the close of all the evidence were denied, as was its alternative motion for a new trial. It appeals from the judgment entered on the verdict in favor of plaintiff, assigning as error the trial court's action in overruling its motions and in giving certain instructions.

Plaintiff had been employed by defendant in various capacities since about 1925 and was, on July 2, 1952, when the accident occurred, working as a brakeman, being as-

signed to the crew of a local freight run between the cities of East St. Louis and Clinton, Illinois. During the course of his duties, in a switching operation at Mount Olive, he noticed that a wheat car in the train was leaking. While the other crew members continued with the task of picking up cars to be incorporated into the train, he started back to the caboose to get some waste to plug the hole in the leaking car. He turned and, on the first step he took, tripped and fell with his left leg buckled under him. He thereby sustained a serious injury to his left kneecap. The accident occurred on the roadbed of defendant's "house track" at a point about one foot from the end of the ties. After plaintiff fell, he looked to see what had caused him to fall and saw a clinker "about the size of my fist" which was partly out of the ground, and a hole beside the clinker. He picked up the offending object and tossed it aside, proceeded to the caboose, procured some waste and plugged the hole in the leaking car. Plaintiff stated that he looked "at the ground" before he stepped but did not see the clinker. He stated further that the footing on the roadbed looked level but was a little soft.

The principal question presented is whether the court correctly ruled that there was sufficient evidence of negligence to require denial of defendant's motions for a directed verdict and submission of the cause to a jury.

Plaintiff's testimony that his injury was caused by his stepping on a clinker is not contradicted. We shall assume, for the purpose of this decision, that such an object on or in the roadbed constituted a hazard to defendant's employees. But to prevail, it was incumbent on plaintiff to adduce evidence that this hazardous condition was produced or was permitted to continue by reason of defendant's negligence. *Moore v. Chesapeake & O. Ry. Co.*, 340 U. S. 573; *Eckenrode v. Pennsylvania R. Co.*, 164 F. 2d 996, aff'd 335 U. S. 329 (C. A.-3); *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7; *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658. Fault or negligence may not be inferred from the mere existence of the clinker and the happening

of the accident. *Delaware, L. & W. R. Co. v. Koske, supra*; *Patton v. Texas & P. Ry. Co., supra*. The employer is not an insurer that the work place be absolutely safe, but is chargeable only with the duty of exercising reasonable care and diligence to see that the place where work is to be performed is reasonably safe for its workmen. *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492; *Delaware, L. & W. R. Co. v. Koske, supra*; *Patton v. Texas & P. Ry. Co., supra*.

Applying these governing principles, we believe the trial court erred in denying defendant's motions for a directed verdict. The evidence, viewed in the light most favorable to plaintiff, supports the following fact statement. He sustained a serious injury when he stumbled over an unusually large clinker which was embedded, partially at least, in defendant's roadbed. At the point where the accident occurred defendant maintains its mainline track which runs in a north-south direction. Parallel to, and east of, that track, defendant maintains a second track which is referred to in the record as the passing track. The latter is connected to the mainline by switches and a cross-over track. Ingress to the passing track is gained over a switch, known as the "house track" switch. The section of the passing track south of the switch is known as the house track. East of these installations, and connected thereto by switches and a cross-over track, are certain facilities of the L. & N. Railroad consisting of its mainline and house tracks. Plaintiff was standing on the roadbed of defendant's house track approximately twenty feet south of the switch when he noticed the leaking condition of the wheat car. The accident occurred at that spot when he turned toward the caboose and took one step. He was regularly employed on the East Saint Louis-Clinton local and worked frequently at this locale. He did not see the clinker before he fell; during cross-examination of plaintiff, the trial judge characterized his testimony as to his knowledge whether, before the accident, the clinker was completely buried in the roadbed in the following language, "It is self-evident that he does not know, if he did not see it." The physical set-up of de-

defendant's house track had been altered in June, 1952, when the level of the house track switch had been raised five inches. In this operation the ties and rails were raised and sufficient ballast in the form of fine cinders and crushed stone was employed to raise the switch to the required level and the grade of the connecting rails to a compensating elevation. There was no direct testimony that this operation affected the roadbed at the point where the accident occurred, i.e., twenty feet south of the switch, but, for purposes of this opinion, we assume that it was affected. Some fifteen cubic yards of ballast were required to accomplish the end result. Further weight is afforded to our assumption by plaintiff's testimony that the footing at that place was level but a little soft. Three different employees testified that they periodically inspected the trackage at this location for defects in the facilities and hazards existing thereon or nearby. One of these witnesses testified that he had, occasionally, discovered large clinkers in the ballast in his territory and had caused them to be removed. Subsequent questioning of the witness elicited the testimony that the "territory" to which reference is made included more than forty miles of defendant's right of way and mainline. There was no testimony as to conditions at the scene of the accident either before or after the occurrence except plaintiff's testimony that he stumbled over an unusually large clinker which caused his injury.

To make a submissible case it was incumbent on plaintiff to adduce substantial evidence that defendant either negligently placed the clinker in the ballast or was chargeable with notice, either actual or constructive, of its presence therein. *Bevan v. New York, C. & St. L. R. Co.*, 132 Ohio St. 245, 6 N. E. 2d 982. We think his proof fails in this respect. There is no evidence as to the agency whereby the hazard was placed in or on the roadbed. Defendant's lines are in close proximity to and are connected with those of the L. & N. Plaintiff testified that the facilities of the two roads were connected to permit the interchange of freight cars between them. A photo-

graphic exhibit which, according to plaintiff's testimony, substantially represents the conditions at the scene of the accident, reveals several buildings in the near vicinity; there is no evidence to show whether these are the property of defendant or of the L. & N. or of some other stranger to the occurrence. The right of way is not fenced, and is, therefore, accessible to the public; there is no evidence as to whether or not the premises are frequented by strangers. There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation.

Furthermore, were we to hold that it was proper to permit the jury so to speculate, plaintiff still would not be entitled to recovery unless it was allowed also to speculate that it is negligence per se to allow such an object to become mixed in with the fine ballast used in improving its roadbed. Defendant's duty to plaintiff in this respect was to exercise the care of a reasonably prudent person, under the existing circumstances, to prohibit the introduction of a hazard into the roadbed where plaintiff was required to work. Cf. *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492; *Missouri Pacific R. Co. v. Zolliecoffer*, 191 S. W. 2d 587, 588 (Ark.). Not only is there no evidence that defendant violated that duty, but also, there is a total want of evidence as to what constitutes reasonable prudence under the proved circumstances.

The record is equally lacking in evidence to prove that defendant had actual or constructive notice of the dangerous condition. The testimony as to actual notice is that no one, plaintiff included, knew of the presence of the clinker until the accident occurred. There is substantial undisputed evidence that this portion of defendant's right of way was inspected frequently, with a purpose which included the seeking out and removal of such hazards. The evidence is silent as to what standard of care plaintiff

was entitled to expect and to rely upon. There is no evidence that defendant was remiss in any respect. There is no proof that its inspection of its premises did not meet the required standard, or that a closer, more thorough, inspection would have disclosed the existence of this hazardous situation.

Plaintiff having failed in his burden of proof, it was error to submit the case to the jury and permit it to reach a verdict by pure speculation. The situation is not unlike that disclosed in *Kaminski v. Chicago River & I. R. Co.*, 200 F. 2d 1 (C. A.-7). *Kaminski*, while working in the course of his employment on the premises of a customer of the defendant railroad, was seriously injured when he fell into a hole beside an industry track. We found that there was no evidence as to when and through what agency the hazardous condition was created or as to the railroad's notice, either actual or constructive, of its existence, and held that the trial court erred in overruling the railroad's motion for a directed verdict. A comparable holding is found in numerous cases involving factually similar situations. See e.g., *O'Mara v. Pennsylvania R. Co.*, 95 F. 2d 762 (C. A.-6); *Bevan v. New York, C. & St. L. R. Co.*, 132 Ohio St. 245, 6 N. E. 2d 982; *Spencer v. Atchison, T. & S. F. Ry. Co.*, 207 P. 2d 126 (Cal. App.); *Waller v. Northern Pacific Terminal Co.*, 166 P. 2d 488 (Ore.); *Matthews v. Southern Pacific Co.*, 59 P. 2d 220 (Cal. App.).

The cases on which plaintiff relies are largely inapposite. In each there was evidence from which the jury might reasonably infer that the defendant either negligently created the dangerous agency involved, or was chargeable with notice of the existence of a condition which rendered unsafe the place where the injured employee was required to work. Eg., *Brown v. Western Ry. of Alabama*, 338 U. S. 294; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, aff'ing, 16 Ga. App. 551, 85 S. E. 809; *Fleming v. Kellett*, 167 F. 2d 265 (C. A.-10); *Waddell v. Chicago & E. I. R. Co.*, 142 F. 2d 309 (C. A.-7); *Pitcairn v. Hunt*, 86 F. 2d 664 (C. A.-7); *Virginian Ry. Co. v. Staton*, 84 F. 2d 133 (C. A.-4); *Smith v. Schumaker*, 85

P. 2d 967, cert; denied 307 U. S. 646 (Cal. App.); *Missouri Pacific R. Co. v. Zollicoffer*, 191 S. W. 2d 587 (Ark.); *Tash v. St. Louis S. F. Ry. Co.*, 76 S. W. 2d 690 (Mo.); *McClain v. Charleston & W. C. Ry. Co.*, 4 S. E. 2d 280 (S. C.); *Lock v. Chicago, B. & Q. R. Co.*, 219 S. W. 919 (Mo.); *Hollaway v. Missouri, K. & T. Ry. Co.*, 208 S. W. 27 (Mo.). The only case cited which purports to justify an inference of negligence merely from the existence of an obstruction and the happening of the accident is *Marcades v. New Orleans Terminal Co.*, 111 F. Supp. 650. The case was tried by the court without a jury and the evidence is not reported. Insofar, however, as that decision imposes liability merely because of the existence of a hazard without any evidence as to defendant's notice, it rests upon a theory of liability without fault and cannot be reconciled with pronouncements by the Supreme Court that the Act does not make railroads insurers of employee safety. *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492.

Since we are of the opinion that defendant's motions for a directed verdict should have been allowed, we find it unnecessary to consider other assignments of error. The judgment is reversed and the cause remanded to the District Court with directions to enter judgment for defendant.

A true Copy:

Teste: _____

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit.

APPENDIX B.

Judgment.

(December 29, 1955)

JOHN W. WEBB,	} Appeal from the	
<i>Plaintiff-Appellee,</i>		United States Dis-
<i>vs.</i>		trict Court for the
ILLINOIS CENTRAL RAILROAD COM-	} Northern District	
PANY,		of Illinois, Eastern
<i>Defendant-Appellant.</i>		Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED with costs, and that this cause be, and the same is hereby REMANDED to the said District Court with directions to enter judgment for the Defendant.

APPENDIX C.

Order Denying Rehearing.

(January 30, 1956)

JOHN W. WEBB,	} Appeal from the	
<i>Plaintiff-Appellee,</i>		United States Dis-
<i>vs.</i>		trict Court for the
No. 11462	} Northern District	
ILLINOIS CENTRAL RAILROAD COM-		of Illinois, Eastern
PANY,		Division.
<i>Defendant-Appellant.</i>		

It is ordered by the Court that the petition for a rehearing of this cause be and the same is hereby, DENIED.

APPENDIX D.

Courts of Appeals; Certiorari.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment of decree. June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. Code, Sec. 1254 (1).

APPENDIX E.

The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404. 45 U. S. Code, Sec. 51.

APPENDIX F.

Actions; Limitations; Concurrent Jurisdiction of Courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989. 45 U. S. Code, Sec. 56.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No.  ~~142~~ 142

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

**REPLY TO RESPONDENT'S BRIEF
IN OPPOSITION.**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 714

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

**REPLY TO RESPONDENT'S BRIEF
IN OPPOSITION.**

**THE QUESTIONS PRESENTED FOR REVIEW
BY RESPONDENT.**

Questions 1 and 2 presented by respondent are immaterial to a decision of the case. The plaintiff was not obligated to prove notice by defendant of a defective condition created by the defendant in its own roadbed. The Court of Appeals in its decision recognized this when it said:

"But to prevail, it was incumbent on plaintiff to adduce evidence that the hazardous condition was produced or permitted to continue by reason of defendant's negligence (Appendix, Petition for Writ of Certiorari, Page 12)

No where in Respondent's brief is a case cited which holds that a *tortfeasor* is entitled to notice of his own wrong doing.

The only real issue in dispute between the parties during the trial and on appeal was whether or not there was evidence from which a jury could reasonably infer that respondent negligently created a condition which caused injury to petitioner.

RESPONDENT'S STATEMENT OF THE CASE.

Respondent has searched the record for facts, and inferences from facts, favorable to it. It would like this Court to believe that the clinker which injured petitioner was not imbedded and concealed in its roadbed.

The evidence favorable to petitioner says:

"I took one step and stepped on a cinder buried in the loose cinders." (Pl. Ex. 2, R. 65, 110)

Respondent indicates that the repairs had not extended to the scene of the accident.

Evidence favorable to petitioner states:

"This track had been worked on shortly before this by the trackman and the cinders were stirred up and loose and this large cinder about six inches in circumference was buried in loose cinders around it so that it was not discernible * * *." (P. Ex. 2, R. 65, 110)

Respondent cites evidence of the frequency of inspection of the premises by its employees. These inspections were made from moving motor cars. (R. 79, 84).

Failure of the inspectors to find the clinker buried in respondent's roadbed does not prove that it was not so buried and concealed but it does strongly indicate that the clinker was not resting on top of its roadbed where it might be expected to be found if placed by a stranger or another railroad.

REASONS FOR GRANTING THE WRIT.

A reading of the Record or of the Statements of the Case filed by each party shows that a factual dispute existed between the parties and that different inferences and conclusions could be drawn from the disputed and undisputed facts.

The numerous cases cited by petitioner on pages 6, 7 and 8 of his Petition demonstrate that this Court has time and again directed Courts of Appeal and trial courts to allow juries to settle this type of dispute.

A large portion of respondent's brief is devoted to its contention that the verdict for petitioner rested upon speculation and conjecture alone.

The petitioner, not the respondent, should and does complain about speculation and conjecture.

Petitioner as shown by his Petition for Writ of Certiorari (P. 3 and 4) demonstrated that he was injured by stepping on a large clinker buried in a new, soft roadbed constructed by respondent's employees about three weeks before the accident in question. His evidence showed that respondent's employees used 15 cubic yards of unscreened cinders in raising its track and roadbed five inches. Petitioner and respondent's witnesses testified that a clinker as described did not belong in a roadbed and made for an unsafe place to work.

From these probative facts the jury could and did infer that respondent negligently maintained its roadbed and thereby failed to furnish petitioner a reasonably safe place to work.

The Court of Appeals held that plaintiff's probative evidence was conjectural and speculative apparently because it did not negate possible acts of negligence of strangers or another railroad.

To reason that a stranger or other railroad might or would come on respondent's property and bury a clinker in its roadbed for no apparent reason or motive is speculation and conjecture of the worst sort.

Brown v. Western Ry. of Alabama, 338 U. S. 294 (1949) and *Southern R. Co. v. Puckett*, 244 U. S. 571 (1916), are not "inapposite" as indicated by the Court of Appeals.

In *Brown v. Western Ry. of Alabama*, 338 U. S. 294 (1949), a complaint was dismissed because it allegedly failed to state a cause of action against the defendant.

This Court reversed the Georgia Courts saying at page 297:

"Other allegations need not be set out since the foregoing if proven would show an injury of the precise kind for which Congress has provided a recovery. These allegations, fairly construed, are much more than a charge that petitioner 'stepped on a large clinker lying alongside the track in the railroad yards.' They also charge that the railroad permitted clinkers and other debris to be left along the tracks, 'well knowing' that this was dangerous to workers; that petitioner was compelled to 'cross over' the clinkers and debris; that in doing so he fell and was injured; and that all this was in violation of the railroad's duty to furnish petitioner a reasonably safe place to work. Certainly these allegations are sufficient to permit introduction of evidence from which a jury might infer that petitioner's injuries were due to the railroad's negligence in failing to supply a reasonably safe place to work. *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353. And we have already refused to set aside a judgment coming from the Georgia Courts where the jury was permitted to infer negligence from the presence of clinkers along the tracks in the railroad yard. (*Southern R. Co. v. Puckett*, 244 U. S. 571, 574, affirming 16 Ga. App. 551, 554, 85 S. E. 809, 811" (Emphasis supplied)

The *Puckett* case, just cited, involved an employee tripping over three large clinkers on a roadbed.

This Court affirming the trial court (244 U. S. 571) said at page 574:

"It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two State courts."

A doctrine of "probabilities" is used by the Court of Appeals to justify its conclusion that petitioner did not maintain his burden of proof. (Appendix, Petition for Writ of Certiorari, P. 15) To distinguish between "possibilities" and "probabilities", as does the Court of Appeals, requires weighing and evaluating of evidence which this Court has said time and again is the function of a jury.

The only case which respondent has been able to find which lends support to the doctrine of "probabilities" is *Patton v. Texas and Pacific R. Co.*, 179 U. S. 658 (1900).

This case pre-dated the Statute upon which petitioner's cause of action is predicated. (Appendix, Petition for Writ of Certiorari, p. 19, 20). While not specifically overruled, it has been swept into discard by the recent decisions of this Court cited on page 6 of the Petition. These cases hold that if there is any evidence in the record standing alone and by itself, from which a jury might reasonably infer that a defendant was negligent, then the jury must decide the case.

In *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, it was said, with reference to a jury trial:

"It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Schulz, Administrator v. Pennsylvania R. Co. decided by this Court on April 9, 1956 (No. 282 October Term, 1955) states:

"In considering the scope of issues entrusted to juries in cases like this, it must be born in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the

tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888)."

Near its conclusion the opinion holds:

"Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

It is petitioner's sincere belief that a fact question existed for a jury and that the Court of Appeals erred in depriving him of his jury verdict.

CONCLUSION.

For the reasons set forth above and in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF ON THE MERITS.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

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No. 42 .
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JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

—
On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

—
BRIEF FOR THE PETITIONER.
—

OPINION BELOW.

The opinion of the Court of Appeals (R. 141) is reported in 228 F. 2d 257 (7 Cir. 1955).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 29, 1955. Petition for Rehearing was denied by that Court on January 30, 1956.

On March 8, 1956, the petition for a writ of certiorari was filed and was granted April 23, 1956. The jurisdiction of this Court is found in 62 Stat. 928, 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED.

By Petitioner:

Question I.

In order to prevail under the Federal Employers' Liability Act, need a plaintiff negate all possible inferences of negligence of persons other than the defendant and prove his case by a standard of "probabilities"?

Question II.

Does a Court of Appeals invade the province of a jury and violate the scope of appellate review in a Federal Employers' Liability Act case by setting aside an employee's jury verdict and judgment and directing entry of final judgment for the railroad when the record shows that:

The Employee stepped on a large clinker buried near a switch stand in a soft, new roadbed constructed by the railroad about three weeks before the accident; the railroad's firemen cleaned their fire-boxes at this location; the employee's duties required him to work on the ground at this point and the employee and the employer's witnesses testified that a clinker as described made for bad footing and an unsafe place to work?

By Respondent:

Question I.

Whether or not in a suit brought under the Federal Employers' Liability Act, the burden of proof remains upon the plaintiff to produce probative facts that the defendant knew, or in the exercise of reasonable care should have known, of the presence of an object, foreign to a roadbed, upon its premises.

Question II.

Whether in the absence of such proof, as found by the Court of Appeals, it can properly reverse the verdict and judgment entered in the trial court against the defendant and direct that judgment be entered for the defendant.

STATUTE INVOLVED.

The Federal Employers' Liability Act (35 Stat. 65; 45 U.S. Code, Sec. 51) (hereinafter for the sake of brevity referred to as the F.E.L.A.) provides:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or

closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U.S. Code, Sec. 51.

STATEMENT.

This action was brought by Petitioner, against the Respondent, under the Federal Employers' Liability Act, (35 Stat. 65, 45 U.S. Code, Secs. 51-60) to recover damages for injuries suffered by him as a result of the alleged negligence of his employer. (R. 3-5) He charged in his complaint that the defendant failed to use ordinary care to furnish him with a reasonably safe place to work and thereby he sustained injuries. (R. 4) The defendant's answer denied that it was guilty of any negligence and alleged that plaintiff's own negligence was the sole cause of, or a contributing cause to his injuries. (R. 6, 7) The parties stipulated that they were both engaged in interstate commerce at the time in question. (R. 8)

Around the middle of June, 1952, certain repairs had been made by Respondent on its house track at Mount Olive, Illinois. (R. 68) This work included raising the rail and ties about 5 inches above their previous level and the use of about 15 cubic yards of new cinder and chat ballast. (R. 72, 73) During the repairs, the house track was closed for use by the trainmen. (R. 67)

About three weeks after the repair work (July 2, 1952) when uncoupling a car on this house track, Petitioner observed a leaking grain car. He was then about 15 feet

south of the house track switch on the east side of the track. He turned around to go to the caboose to get some waste to use as a plug and stepped on a large buried clinker. (P. Ex. 2, R. 65, 111) He did not notice the clinker on top of the roadbed. (R. 15) He had looked at the ground before stepping and it was level, looked like good footing outside of being a little loose. (R. 43) When he stepped on the clinker his foot turned, he was thrown off balance and his leg doubled under him and he sustained injuries. (R. 14) After the accident he saw the clinker with a hole right by its side. (R. 44) It was partially kicked out of the cinders. (R. 61) It was about the size of his fist. (R. 14) He testified he did not know when it was placed in the roadbed or by whom. (R. 62)

Petitioner, a man with 25 years railroad experience and a former section hand, testified that it is not a customary practice to use clinkers the size of a man's fist in a railroad road bed. They don't pack down and give good footing. (R. 44) Lester Rector, Respondent's section foreman, who had charge of the Mount Olive track raising and new ballasting, said that such a large clinker would not belong in a road bed near a switch stand. (R. 77) Rector and Ed. Oelrichs, Respondent's track inspector, and John Brosnahan, Respondent's track supervisor, each testified that they inspected the house track once or twice a week (R. 74, 78, 84). Oelrichs' inspection was made from a motor car going 3 to 5 miles an hour. (R. 79) Brosnahan made his inspection from a motor car. (R. 84) They received no complaints of bad footing. (R. 75, 79, 80, 86) Brosnahan, testified that one purpose of ballast is to provide safe footing for trainmen. He stated that the presence of a clinker as described and located would represent an unsafe place to work. (R. 87) The cinders were not screened before being used in the new roadbed. (R. 77)

The site of the accident was the only place for Respondent's firemen to clean their fire boxes at Mount Olive. (R. 59)

Webb's statement taken by Respondent's claim agent in August, 1952, was admitted in evidence by agreement. It states in part:

"I took one step and stepped on a cinder buried in the loose cinders about a foot from the end of the ties. When I stepped on this cinder it threw me off balance, caused me to fall and I injured my left knee as I fell. This happened about 15 feet south of the house track switch on the east side of the house track. This track had been worked on shortly before this by the trackmen and the cinders were stirred up and loose and this large cinder about six inches in circumference was buried in the loose cinders around it so that it was not discernible from the rest of the small loose cinders. It looked like the surface was level and good enough footing but this cinder being solid in the loose cinders caused my foot to turn as I stepped on it, turned my foot and caused me to fall so that I injured the cartilage in my knee as I fell." (P. Ex. 2, R. 65, 111)

The jury returned a verdict for petitioner in the sum of \$15,000.00. Judgment was entered on the verdict.

Motions for new trial and for judgment notwithstanding the verdict were denied. (R. 128) On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment and remanded the case to the District Court with directions to enter judgment for respondent. (R. 147) Petition for rehearing was denied. (R. 147)

SUMMARY OF ARGUMENT.

In the present case the jury could have found the following facts from the evidence:

1. Petitioner was injured by stepping on a large clinker buried near a switch stand in Respondent's road-bed.

2. About three weeks before this accident the area had been worked on by Respondent's section crews, the track and ties had been raised about five inches and the section crews in working two days had distributed about fifteen cubic yards of unscreened cinders and chat for new ballast.

3. The Respondent's firemen cleaned their fireboxes at this location.

4. The presence of a large buried clinker at the place described rendered the place unsafe for a switchman to perform his duties.

From these facts the jury could and did infer that respondent negligently failed to furnish petitioner with a reasonably safe place to work.

The Court of Appeals deprived the petitioner of his right to trial by jury when it reversed the judgment of the trial court and directed the entry of final judgment for the railroad.

The Court of Appeals in its opinion recognized that the Respondent may have placed the clinker in its road-bed as part of the ballast used in the repair operation, but said this was merely one of several possibilities present. It suggested that strangers or another railroad

may have been responsible for the presence of the clinker in Respondent's roadbed. It was in error when it decided that no probabilities could be deduced from the evidence and therefore the verdict was based on speculation and conjecture.

When fair-minded men can draw different conclusions from the evidence, the case is not one of law but of fact to be settled by the jury. *Myers v. Reading Co.*, 331 U.S. 477; It is the intent of Congress that to the maximum extent proper, questions in actions arising under the Federal Employers' Liability Act should be left to the jury. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54; and such cases may not be taken from the jury merely because the question of liability is close or doubtful, *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. *Tennant v. Reoria & P. U. Ry. Co.*, 321 U.S. 29.

In any case in which fair-minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. It is not material that an Appellate Court may draw a contrary inference or feel that another conclusion is more reasonable. *Lavender v. Kurn*, 327 U.S. 645.

Under the liberal interpretation of the Federal Employers' Liability Act, as announced by this Court, the humanitarian intention evidenced by Congress in passing and amending the statute and the broad scope of the

jury's function as a fact-finding body, the Court of Appeals erred in directing the trial court to set aside the verdict of the jury and enter final judgment for the railroad.

It is important that the decision of the Court of Appeals be set aside because it is in conflict with the decisions of this Court. The opinion, if permitted to stand, will permit trial and appellate courts to weigh and evaluate evidence by measuring it in terms of "possibilities" and "probabilities" and thereby usurp the functions of the jury, contrary to the directions and admonitions of this Court and the intent of Congress.

ARGUMENT.

POINT I.

A plaintiff need not negate inferences of negligence of third persons in order to recover under the Federal Employers' Liability Act.

The Court of Appeals decision was based on the alleged failure of plaintiff to adduce evidence from which probabilities could be deduced. The Court stated that a possibility existed that the defendant placed the clinker in its roadbed as part of the ballast used in the repair operation but it noted that the tracks of another railroad were nearby, that the premises were unfenced and the record did not disclose whether the premises were frequented by strangers. (R. 144) It, therefore concluded that a finding that the defendant placed the clinker in its roadbed rested on conjecture and speculation.

Plaintiff contends that on the basis of probabilities the jury was justified in finding the issues in his favor. He earnestly maintains that irrespective of where the possibilities or the probabilities lay, from the viewpoint of the Court of Appeals, that Court had no right to weigh and evaluate the evidence or to classify it in the light of possibilities or probabilities and thus usurp the function of the jury.

Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 34, 35 (1944) is similar in several respects to the *Webb* case. The Court of Appeals for the Seventh Circuit in both cases held that there was no evidentiary basis for the jury verdict and said it was based on speculation and

conjecture. In the *Tennant* case the Court of Appeals outlined numerous ways, associated with non-negligence of the railroad, to explain the accident and indicated that it thought the most reasonable explanation for the death of the employee was that he seated himself upon an engine footboard, fell asleep and rolled to his death when the engine moved. In its opinion (134 F. 2d 860; 1943) the Court says at page 869:

"We think we have sufficiently discussed the various theories as to the cause of decedent's death, particularly plaintiff's theory, to demonstrate that it is shrouded wholly within the realm of speculation and conjecture."

The Court goes on to cite *Patton v. T. & P. Ry. Co.*, 179 U.S. 658 (1900), as it does in the *Webb* case, to hold that where many causes may have brought about the injury, for some of which the employer might be liable and for others not responsible, then plaintiff has failed in his burden of proof.

The United States Supreme Court granted certiorari and reversed the Court of Appeals.

Speaking through Mr. Justice Murphy at pages 34 and 35, the Supreme Court said in the *Tennant* case:

"In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and

been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury. * * *

* * *

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witness, receives expert instruction, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

We respectfully submit that the Court of Appeals in the case now before the Court violated the clear mandate of this Court in searching the record for conflicting circumstantial evidence, *e. g.* the presence of tracks of another railroad or the possibility of access by strangers. It said, in effect, that the jury could not select from among conflicting inferences that which the jury thought most reasonable presumably because "there are no probabilities to be deduced from this evidence."

Even assuming that the proof did give equal support to inconsistent and uncertain inferences the case should have been decided by the jury.

The jury had the right, in view of plaintiff's positive testimony, to assume that the clinker was buried in defendant's roadbed. (R. 60, P. Ex. 2, R. 65, 111) The ballast was soft and left footprints. (R. 15) Fifteen cubic yards of unscreened cinders had been used in the repair job. (R. 77) This was the only place at Mt. Olive where defendant's firemen cleaned their fire boxes. (R. 59) The repair job preceded the accident by about three weeks. (R. 68) The inference that defendant's section hands failed to remove the clinker or placed it in the roadbed is not an unreasonable one; in fact it is the logical answer to its presence.

That the existence of the clinker made for an unsafe place to work is not a debatable issue. The plaintiff testified that a clinker did not belong in a roadbed near a switch (R. 44) and defendant's witnesses corroborated him. (R. 77, 87)

It is speculation and conjecture of the worst type to conclude or infer that a stranger or another railroad, with no plausible motive, would come on respondent's property and bury a clinker near its switch stand.

In *Lavender v. Kurn*, plaintiff's decedent was killed in an unwitnessed accident. Her theory was that the decedent was killed when struck on the head by a mail hook projecting from a backing train. The defendants contended that he had been murdered. Strangers frequented the premises, the mail hook showed no evidence of contact with a human body and there was evidence to show that it was physically and mathematically impossible for the hook to strike the decedent.

The Missouri Supreme Court reversed a jury verdict for plaintiff, 354 Mo. 196, 208; 189 S.W. 2d 253, 259 (1945). It said:

"* * * it is well settled that a mere possibility of negligence is not a sufficient foundation for an inference of negligence which will justify submission of a case to a jury."

The United States Supreme Court (327 U.S. 645, 653, 1946) reversed the Missouri Supreme Court stating:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

In *Myers v. Reading Co.*, an experienced brakeman was injured due to the alleged defectiveness of a railroad car handbrake. The jury found the issues in his favor and by special interrogatory found that the brake was not efficient.

The trial judge allowed defendant's motion for judgment *non obstante veredicto*. In its opinion 63 F. Supp. 817, 821 (E. D. Penn. 1945) it says:

"From the paucity of proof offered by plaintiff the jury might logically draw the inference that the brake was inefficient and might just as logically have drawn the inference that the brake reacted normally and efficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact it establishes neither. In this situation the jury should not have been permitted to draw conclusions from plaintiff's evidence regarding the inefficiency of the brake since their conclusion of necessity would have to be based on conjecture and speculation."

The trial judge was affirmed by the Court of Appeals for the Third Circuit in a *per curiam* opinion, 155 F. 2d 523 (1946).

The Supreme Court reversed the District Court and Court of Appeals, 331 U.S. 477, 484, 486 (1947), saying through Mr. Justice Burton:

"While different conclusions might be possible, the jury, which heard the testimony and saw the petitioner's illustrations of handling the brake, reasonably could infer from that evidence that the condition of this brake and its actions were not those of an efficient hand brake."

"We believe that the evidence given at the trial, with the inferences that the jury could reasonably draw from it, was sufficient to support the verdict originally rendered for petitioner."

The *Myers* case refers to *Spotts v. Baltimore & O. R. Co.*, 102 F. 2d 160, 162 (7 Cir. 1939). In that case the efficiency of a railroad brake was involved and the defendant urged on appeal that there was no substantial or probative evidence to support plaintiff's judgment. The Court of Appeals rejected this contention saying:

"In other words, we cannot say as a matter of law that any and all inferences which the jury might reasonably draw from the evidence would support only a verdict for defendant and not for plaintiff. Nor can we say that, as a matter of law, the contradictory evidence offered by defendant shows that plaintiff's testimony cannot be true. A contention for such action is an appeal to us to weigh the conflicting evidence in the light of probabilities and thus to invade the exclusive province of the jury, and, on an application for a new trial, of the trial judge. This we may not do."

Stanczak v. Pennsylvania R. Co., 174 F. 2d 43, 46 (1st Cir., 1949), involved an unwitnessed death of a brakeman who was crushed between a box car and a loading platform. There was evidence of a defective caboose platform and proof that the edges of the loading platform were rough and uneven. The defendant contended that there was no evidence that its negligence or defective equipment caused the accident. The trial court (the same judge who tried this case) refused to direct a verdict for the defendant and his ruling was affirmed on appeal.

The Court of Appeals said:

"In their effort to arrive at a solution of the problem as to how Stanczak came to be found in the position in which he was found between the platform and the boxcar the jury was not only required to resolve all disputed questions of fact but was permitted to draw reasonable inferences and make reasonable deductions from all the facts and circumstances surrounding the occurrence as shown by the evidence." *Wilkerson v. McCarthy*, 336 U.S. 53; *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Tennant v. Peoria and P. U. Ry. Co.*, 321 U. S. 29; *Johnson v. Southwestern Engineering Co.*, 41 Cal. App. 2d 623, 107 P. 2d 417.

"There being evidence from which the jury may reasonably have inferred that Stanczak came to his death by one of the means suggested above and upon which to base a finding that such means involved negligence on the part of the appellant under the circumstances shown by the evidence, it is not within the function of this court to go back of the jury's verdict to consider other means not involving negligence on the part of appellant." *Lavender v. Kurn*, 325 U. S. 645; *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54; *Bailey v. Central Vermont R. Co.*, 319 U. S. 320.

In *Henwood v. Coburn*, 165 F. 2d 418 (S. Cir. 1948) at page 423 the Court says:

"In connection with what has been said, there is to be borne in mind also the apparent emphasis in the recent decisions of the Supreme Court that questions of negligence and proximate cause under the Federal Employers' Liability Act are generally for the jury; that the field of jury inference is a broad one and only requires a rational possibility on the facts; and that a verdict is not necessarily one of speculation and conjecture because inferences are arrived at by the application of general experience and common reaction to the evidentiary situation. See *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Ellis v. Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed.; *Tiller v. Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Tenant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 144."

POINT II.

The action of the Court of Appeals in searching the record for conflicting circumstantial evidence and directing entry of judgment for respondent deprived petitioner of his right of trial by jury contrary to the provisions of the Seventh Amendment to the United States Constitution.

The original F. E. L. A. statute of 1906 (34 Stat. 232) as repassed in 1908 (35 Stat. 65), abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence and allowed survivor's actions for tort liability.

The 1939 amendments to the Act (53 Stat. 1404) abolished the defense of assumption of risk, extended the limitation period and broadened and clarified the duties of employees who were subject to the Act. The liberal and

humanitarian intention of Congress was evident from the legislation and the Supreme Court of the United States in a long line of cases evidenced its intention to protect the right of the injured employee to a jury trial and to place a liberal and humanitarian construction on the Act.

These cases include *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54 (1942); *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350 (1942); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944); *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600 (1944); *Lavender v. Kurn*, 327 U. S. 645 (1946); *Ellis v. Union P. R. Co.*, 329 U. S. 649 (1947); *Myers v. Reading Co.*, 331 U. S. 477 (1947); *Wilkerson v. McCarthy*, 336 U. S. 53 (1948); *Stone v. New York, C. & St. L. R. Co.*, 344 U. S. 407 (1953) and *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523 (1956).

Tiller v. Atlantic Coast Line R. Co. was an unwitnessed death case. It was before the Court on two occasions 318 U. S. 54, 68 (1942) and 328 U. S. 574 (1945).

In the first case, the footnote at page 68 states:

"It appears to be the clear Congressional intent, that to the maximum extent proper, questions in actions arising under the Act should be left to the jury * * *"

In *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353 (1942), the Vermont Supreme Court reversed a trial Court and held that a directed verdict should have been granted. Bailey fell to his death while helping to unload a cinder car over a depressed cattle pass. The evidence showed a narrow bridge, no guard rail and other facts from which the jury could have inferred that the railroad did not furnish its employee with a safe place to work.

The Supreme Court speaking through Mr. Justice Douglas said at page 353:

"The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a function from the jury is to usurp its functions."

"The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Ellis v. Union P. R. Co.*, 329 U. S. 649, 653 (1947) an employee was crushed between a moving railroad car and a building. A trial court and jury were reversed by the Nebraska Supreme Court which held there was no evidence of negligence.

Certiorari was granted by the United States Supreme Court which analyzed the considered numerous ways in which the accident could have happened and reversed the Nebraska Supreme Court.

In the opinion, at page 653, the Court said:

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Once there is a reasonable basis in the record for concluding there was negligence which caused the injury, it is irrelevant that fair

mind men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

In the early case of *Railroad Company v. Stout*, 17 Wall. 657, 663 (1873), Mr. Justice Hunt, speaking for the Court said:

"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

In *Brown v. Western R. of Alabama*, 338 U. S. 294, 297 (1949), an employee's injury case was dismissed because it allegedly failed to state a cause of action against the defendant.

This Court reversed the Georgia Courts, saying at page 297, through Mr. Justice Black:

"Other allegations need not be set out since the foregoing if proven would show an injury of the precise kind for which Congress has provided a recovery. These allegations, fairly construed, are much more than a charge that petitioner 'stepped on a large clinker lying alongside the track in the railroad yards.' They also charge that the railroad permitted clinkers and other debris to be left along the tracks, 'well knowing' that this was dangerous to workers; that petitioner was compelled to 'cross over' the clinkers and debris; that in doing so he fell and was injured; and that all this was in violation of the railroad's duty to furnish petitioner a reasonably safe place to work. Certainly these allegations are sufficient to permit introduction of evidence from which a jury might infer that petitioner's injuries were due to the railroad's negligence in failing to supply a reasonably safe place to work. *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353. And we have already refused to set aside a judgment coming from the Georgia Courts where the jury was permitted to infer negligence from the presence of clinkers along the tracks in the railroad yard. *Southern R. Co. v. Puckett*, 244 U. S. 571, 574, affirming 16 Ga. App. 551, 554, 85 S. E. 809, 811."

Every essential element outlined in the *Brown* case is present in the *Webb* case or could have been reasonably inferred by the jury from the evidence which it heard.

The *Puckett* case, just cited, involved an employee tripping over three large clinkers on a roadbed.

This Court, affirming the trial court (244 U. S. 571; 1916), said at page 574:

"It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two State Courts."

In *Waddell v. Chicago & E. I. R. Co.*, (7 Cir. 1944) 142 F. 2d 309, 310, plaintiff was injured when a railroad motor car was derailed at a public crossing. Plaintiff contended that defendant was negligent in permitting stones to exist between the planking and rails. The defendant contended that the condition, if it existed, was due to rocks recently lodged in the space of which it had no notice.

Defendant also stressed "the probability that the derailment was caused by a collision between the motor car and an automobile traveling on the highway."

The Court of Appeals said at page 310:

"There is no direct proof in support of this theory. It must be admitted, we think, that the circumstances create a strong suspicion that such might have been the case. Plaintiff, however, expressly denied that his car had collided with an automobile, which testimony, if believed by the jury eliminated a collision as the cause of the derailment. At any rate, this contention presents merely another aspect of the case which the jury no doubt considered and decided adversely to defendant's contention.

While a study of this record creates doubt, as to the correctness of the results reached in the court below, we are compelled, so we think, to decide that

a jury question was presented, and it follows that the court did not err in its refusal to direct a verdict."

McClain v. Charleston & W. C. Ry. Co., 191 S.C. 332; 4 S. E. 2d 280 (S. C. Sup. 1939), is a case strikingly in point. A station agent suffered a fall in a railroad yard in a concealed hole in the roadbed. The proof showed that a repair job on the ties had been completed from four days to a week before. The roadbed "looked smooth and all right." The place that she stepped on seemed to be a regular hole and her foot went down and struck a rock which was concealed in the soft dirt. The upper court reversed a trial court which had directed a verdict against the plaintiff holding a question of fact existed for the jury on the safe place to work issue.

The Court of Appeals in the *Webb* case erred in another respect in its opinion and judgment.

In its opinion that Court says: (R. 144)

"* * * plaintiff still would not be entitled to recovery unless it was allowed also to speculate that it is negligence per se to allow such an object to become mixed in with the fine ballast used in improving its roadbed."

✓ We refer the Court to page 87 of the Record where defendant's track supervisor was being cross-examined:

"Q. I believe you stated the various purposes of ballast. Let me ask you, Mr. Brosnahan, if one of them is not to afford safe footing for trainmen whose duties require them to work in or about switch stands?

A. Yes, sir.

Q. In your opinion, Mr. Brosnahan, would the presence, if it existed, of a clinker the size of a man's fist imbedded in the cinders, adjacent to a switch stand, represent a safe place for a trainman to work?

A. No, sir."

Defendant's witness, Lester Rector, the foreman of the Mt. Olive repair job was cross-examined by petitioner's counsel.

At page 77 of the Record appears:

“Q. I believe you stated, Mr. Rector, that you would not use a large clinker in the ballast near a switch stand, is that right?

A. That is right, I would not.

Q. Would you use ballast with clinkers the size of a man's fist?

A. No, sir.

Q. That would not belong in the roadbed near a switch stand, would it, Mr. Rector?

A. No, sir.”

Petitioner testified it is not the custom and practice to use a clinker as described because

“it doesn't pack down; it doesn't give good footing; and it cannot be tamped in under the ties for support.” (R. 44)

This positive and uncontradicted testimony made an issue of fact for the jury to determine as to whether or not a safe place to work was provided by the respondent.

In *Wilkerson v. McCarthy*, 336 U. S. 53, 61 (1948), it is said:

“But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the circumstances. And a jury should hold a master liable for injuries attributable to conditions under his

control when they are not such as a reasonable man ought to maintain in the circumstances bearing in mind that 'the standard of care must be commensurate to the dangers of the business'."

Schulz, Administrator v. Pennsylvania R. Co., 350 U. S. 523, 525, 526, decided by this Court on April 9, 1956, states:

"In considering the scope of issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact why it should not decide such questions as these as well as others.' *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888)."

Near its conclusion the opinion holds:

"Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Gardner v. Michigan Central Railroad Co., 150 U. S. 349, 361 (1893) holds that:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusions from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Railway Co. v. Ives*, 144 U. S. 408, 417; *Railway Co. v. Cox*, 145 U. S. 593, 606; *Railway Co. v. Miller*, 25 Mich. 274; *Sadowski v. Car Co.*, 84 Mich. 100."

In *Texas & Pacific R. Co. v. Cox*, 145 U. S. 593 (1892) at page 606 Chief Justice Fuller says:

"The case should not have been withdrawn from the jury unless the conclusion followed as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." (citations).

The jury had before it sufficient probative facts to sustain its verdict for petitioner. The Court of Appeals deprived him of his constitutional right to a trial by jury when it reversed the trial court judgment and the verdict of the jury and directed entry of final judgment for the railroad.

POINT III.

Petitioner was not obligated to prove notice by respondent of a defective condition created by respondent in its own roadbed.

The respondent in its brief in opposition to the petition for writ of certiorari set forth two questions for review. These questions are printed on pages two and three of this brief.

They ask this Court to determine whether or not plaintiff had the burden of producing probative evidence of

defendant's knowledge of the clinker in its roadbed and to determine if the Court of Appeals had the right to reverse the trial court judgment and direct entry of judgment for defendant in the absence of such proof.

The statute in question (35 Stat. 65, 45 U. S. C. 51) quoted on page 3, provides that the railroad shall be liable in damages to an employee who suffers injury resulting by reason of the negligence of any agents or employees of the carrier or any defect or insufficiency due to its negligence in its track or roadbed.

Since the employer acts through its employees, their wrongful acts or neglect is its tort.

Plaintiff's theory from the time of the filing of his complaint (R. 4) to the conclusion of the trial was that defendant undertook to make repairs in its roadbed and track, did so in a negligent manner and that he was injured thereby.

The Court of Appeals recognized this when it said:

"But to prevail, it was incumbent on plaintiff to adduce evidence that the hazardous condition was produced or permitted to continue by reason of defendant's negligence." (R. 142)

It would be an injustice to require proof that defendant knew of its own negligent act and in most cases an impossible task.

In *Sears, Roebuck & Co. v. Peterson*, 76 F. 2d 243, 246 (8 Cir. 1935), plaintiff tripped on a piece of twine on the floor of defendant's store and recovered judgment. On appeal, the defendant contended that there was no proof that it had knowledge of the twine upon the floor.

The Court of Appeals rejected this contention saying:

"This is not a case in which the condition was attributable either to the elements or the act of some third party. The negligence here complained of was that of defendant itself, committed, it is true, by the employee. It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act, or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act or omission of the owner of the premises."

The jury was presented with evidence from which it could reasonably conclude that the plaintiff was injured through defendant's negligence, and plaintiff was not required to show that the tort-feasor had knowledge of its wrongful conduct.

CONCLUSION.

Petitioner respectfully submits that the judgment of the court below should be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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Office - Supreme Court, U.S.

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NOV 23 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF:

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1956.

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

I.

Respondent's Additional Statement of Facts does not include facts warranting the reversal of the jury verdict and the trial court judgment thereon.

The respondent has included a Statement of Additional Facts in its brief.

Therein it states that petitioner had occasion to pass over the house track switch every day. This is not the fact. The track was closed to trainmen while being repaired. (R. 67) Webb passed through Mt. Olive almost daily but he did not know if he went on to the part of the track involved in the accident. (R. 68)

The Additional Statement of Facts also says that the repairs to respondent's house track were made in March,

1952. Petitioner, having secured a jury verdict and trial court judgment thereon, is entitled to have the facts and inferences thereon, favorable to him, and these alone, considered on review.

Petitioner testified that the repairs were made about three weeks before the accident in question, "in the month of June" 1952. (R. 68) It is true respondent's witness testified that the repairs were made in March of 1952, but he testified that his records, which would show when the repairs were made, had been destroyed, even though petitioner's claim was then pending. (R. 76).

Respondent disputes petitioner's contention that the clinker was buried in its roadbed. Suffice it to say the jury could have found this to be the fact.

The following excerpts from the record establish this contention of petitioner:

...

Q. Before you took this step, at which time you (the petitioner) had the accident—did you have occasion to look at the ground.

A. Yes, sir.

Q. What, if anything, did you see then?

A. It was level, looked like good footing, outside of being a little loose. (R. 43)

When questioned about the clinker's position after the accident:

Q. John, did you have any occasion at that time to see where the clinker had been?

A. Yes, sir, there was a hole right by the side of the clinker." (R. 44)

On cross examination of petitioner, the following was elicited:

"Q. You don't know whether it was slightly out of the ground or whether it was buried completely in the ground or exactly how?

A. It must have been completely buried, covered over." (R. 60)

With reference to its position after the accident the following was said:

"Q. And at that time it was just barely discernible, was it not?

A. No, sir. It was partially kicked out of the cinders and there was a hole there by the side of it. (R. 61)

• • •

Q. And do you recall whether this statement (taken by respondent's claim agent and admitted in evidence) had in it:

"The cinders were stirred up and loose, and this large cinder, about six inches in circumference, was buried in the loose cinders around it."?

A. Yes, sir." (P. Ex. 2, R. 65, 111).

II.

Petitioner sustained his burden of proof if there was probative evidence from which the jury could reasonably infer negligence of the respondent.

Respondent contends that petitioner has misconstrued the opinion of the Court of Appeals. It states that respondent has no quarrel with the proposition that the petitioner need not negate inferences of negligence of third persons in order to recover under the Federal Employers' Liability Act.

The fact that respondent and petitioner agree on this important proposition of law simplifies the dispute be-

tween them. It does not change the fact that the Court of Appeals determined that no probabilities could be deduced from the evidence presumably because the offending clinker might have been placed in the Illinois Central roadbed by the L. & N. Railroad or by a stranger.

The opinion of that Court says:

"There is no evidence as to the agency whereby the hazard was placed in or on the roadbed. Defendant's lines are in close proximity to and are connected with those of the L. & N. Plaintiff testified that the facilities of the two roads were connected to permit the interchange of freight cars between them. A photographic exhibit which, according to plaintiff's testimony, substantially represents the conditions at the scene of the accident, reveals several buildings in the near vicinity; there is no evidence to show whether these are the property of defendant or of the L. & N. or of some other stranger to the occurrence. The right of way is not fenced, and is, therefore, accessible to the public; there is no evidence as to whether or not the premises are frequented by strangers. There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation." (R. 144)

It is respectfully submitted that the clear import of this language of the Court of Appeals is that there are "possibilities" that the offending clinker was placed in respondent's roadbed by the L. & N. Railroad or a stranger. The only way that the "possibility" of respondent's negligence could be converted to the "probability" required by the Court of Appeals was by negating the possibilities of negligence of the other railroad and of strangers or by proving, beyond a reasonable doubt,

that the Illinois Central section men placed the clinker in the roadbed when they raised it five inches.

The Court of Appeals, by suggesting that the L. & N. Railroad may have been responsible for the clinker in the I.C. house track roadbed, does not help the respondent herein even though there is not a shred of evidence to support this possibility.

In *Corpus Juris Secundum*, Vol. 56, Sec. 212 (d) (Master and Servant) page 921, it is said:

“ * * where it has allowed another corporation to run its trains over its tracks, it has been held that such consenting company remains liable for the negligence of the other company as much as it would be for that of its own.”

In *Armstrong v. C. & W. I. R. R. Co.*, 183 N.E. 478, 480; 350 Ill. 426; 431 (Ill. Sup. 1932), the Court says:

“The principle is thoroughly established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another whom the owner authorizes or permits to use its tracks, both railroad companies are liable to respond in damages to the party injured. (citations) * * * and although the relation of lessor and lessee is not shown to exist, the rule applies to cases where the owner permits another to use its tracks.” (citations)

In accord is *Wegman v. Gt. Northern Ry. Co.*, 249 N.W. 422, 189 Minn. 325 (Minn. Sup. 1933).

Since the respondent, Illinois Central Railroad Company is responsible for its own negligence in maintaining its track and roadbed, and responsible for the negligence of the L. & N. Railroad while using this track and roadbed, the only escape for the respondent is that a stranger's misconduct caused petitioner to be injured.

The jury could have drawn this inference and found against the petitioner, but it did not do so. It is not surprising that the jury gave no consideration to this speculative and remote possibility. There is no conceivable reason why a stranger should come on the respondent's right-of-way and secretly and furtively bury a clinker therein.

As ~~has~~ said in *Wabash Screen Door Co. v. Black*, 126 F. 721, 725 (C. A. 6, 1903):

"But in the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of. The theories suggested may be forced and fanciful, finding no reasonable foundation in the facts proved. They may be explanations which do not explain; which the common sense of the jury, when applied to the testimony, would instantly reject."

Terminal R. Assn. v. Farris (C.A. 8, 1934) 69 F. (2d) 779 at page 785 holds:

"The fact that hypothesis incompatible with the liability of the appellant may be conjectured or imagined when such are not based on any testimony in the case, affords no reason to reverse a judgment which is supported by the testimony."

In *Foster v. Union Starch & Refg. Co.*, 137 N.E. 2nd 499, 502 (Ill. App. 1956), the railroad employee was injured on the premises of the starch company due to a falling pinch bar. There was a dispute whether either defendant was negligent. In reviewing the matter the Appellate Court said:

"We have concluded that the circumstances thus disclosed, do point to this defendant's employees as

- 1 -

the ones who are responsible for leaving the bar in that position. There are, of course, other possibilities which cannot be excluded with certainty. Under this condition, it is the law of this state that a jury question is presented, since it is only necessary that the conclusion arrived at by the jury be based on an inference that is itself reasonable under the facts.

'A verdict may not be set aside merely because the jury could have drawn different inferences or because judges feel that other conclusions than the one drawn would be more reasonable.' *Lindroth v. Walgreen Co.*, 407 Ill. 121, 94 N.E. 2d 847, 854. A plaintiff is not required to prove his case beyond a reasonable doubt or exclude every hypothesis suggesting a cause other than negligence. *Heimsoth v. Falstaff Brewing Corp.*, 1 Ill. App. 2d 23, 116 N.E. 2d 193."

In *Weiland v. So. Pac. Co.*, 93 P. 2d 1023, 1025 (Cal. Dist. Ct. App. 1939) the Court says:

"If however plaintiff has proven sufficient facts to justify a verdict upon one theory the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury."

There was ample probative evidence as outlined on pages 4 to 6 of Petitioner's Brief on the Merits from which respondent's negligence and its causal relation to petitioner's injury could be reasonably referred.

It is a most logical conclusion, when a large clinker is found in a roadbed which is only three weeks old, that respondent's section hands, had buried it in the new ballast, or failed to remove it from the ballast; particularly since respondent's witnesses made frequent visual

surface inspections and did not see the clinker in question on top of the roadbed.

Since the presence of the clinker, by the testimony of petitioner and the respondent's witnesses, rendered the premises unsafe for a trainman to walk, the jury had the right to find respondent guilty.

Screening, sifting or raking would have disclosed the presence of the clinker. Respondent did none of them.

As was said in *Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407, 409 (1953):

"We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. * * * The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury * * *."

III.

Respondent's cases and argument are not controlling.

Gulf, Mobile & N. R. Co. v. Wells, 275 U.S. 455 (1928), turned on the fact that the engineer, who was allegedly negligent in giving the train a sudden and unnecessary jerk, was not shown to have known that Wells was attempting to board the train or that he was in a position where a lurch or jerk might injure him.

Hawkins v. Clinchfield R. Co., 266 S.W. 2d 840 (Tenn. App. 1953), involved an employee stepping on a board with a nail in it. There was no evidence from which a jury might reasonably have inferred that the railroad was responsible for the presence of the board and in the absence of such proof, notice was required. Here there was evidence from which the jury might reasonably have

concluded that ~~the~~ respondent was responsible for the presence of the clinker which injured Mr. Webb. We submit that if the board had been buried in a newly constructed roadbed, the case would have been decided otherwise.

Patton v. Texas & P. R. Co., 179 U.S. 658 (1900), is relied upon by the Court of Appeals and the respondent. It pre-dated the statute upon which petitioner's cause of action arose and while never specifically overruled it has been cited by this Court but once in the last 15 years, and then in *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 353 (1942), to illustrate the point that at common law the master was bound to use ordinary care to furnish his employee with a safe place to work.

United States v. Crume, 54 F. 2d 556, 558 (C.A. 5, 1931) involved a claim for total disability on a war risk insurance policy. The claimant's own testimony was that he had worked continuously since his discharge from the service and the only physician who was called by the plaintiff did not substantiate his claims of total disability.

This case did not involve even possibilities of the plaintiff being totally disabled, much less probabilities thereof, and so the Court of Appeals correctly ruled for the government. The opinion recognizes the right of a jury to draw reasonable inferences from the evidence.

Cross Co. v. Simmons, 96 F 2d 482 (C.A. 8, 1938) turned on the question whether plaintiff's decedent (Soars) was or was not an invitee on the premises of the defendant. One Murphy was invited on the premises of the defendant to perform some work and Soars accompanied him. Soars did not work for Murphy, he had never been on the defendant's premises before and had no duties to perform on this trip. There was no evidence from which

the jury could have inferred that he was an invitee, and hence the Court correctly held that the jury could not be permitted to speculate on Soars' status as an invitee.

Love v. New York Life Ins. Co., 64 F. 2d 829 (C.A. 5, 1933), was a case on an insurance policy where the company defended a double indemnity claim by alleging the insured committed suicide. He was an embezzler, took his own gun into a vault and was found dead. In a two to one decision the Court of Appeals upheld the trial court's directed verdict for defendant.

On page 832 in concluding the opinion it says:

“ * * * in our opinion the only reasonable or probable inference to be drawn from the evidence, construed most favorable for the plaintiff, is that the gunshot wound which caused Love's death was intentionally self-inflicted—.”

New York Life Ins. Co. v. Trimble, 69 F. 2d 849, (C.A. 5, 1934), is another case on an insurance policy where the defendant resisted a double indemnity claim on the grounds that the decedent committed suicide. His body was found with his hand gripping a pistol and powder marks on his temple. The bullet came from the gun. There were no signs of a struggle and none of his property was missing. The Court said (p. 850) “verdicts must rest on probabilities, not on bare possibilities” citing *Love v. New York Life Ins. Co.* The concurring opinion says that plaintiff's own proof showed the decedent died of self-inflicted wounds. There was no need to distinguish “possibilities” or “probabilities” as there was only one possible conclusion to be drawn in the case.

None of respondent's cases are even remotely similar on the facts, few involve an interpretation of the Federal Employers' Liability Act and there is not one case cited

which overrules the pronouncements of this Court in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350 (1942); *Wilkerson v. McCarthy*, 336 U.S. 42 (1948); *Lavender v. Kurn*, 327 U.S. 645 (1946), and the other cases cited on page 18 of Petitioner's Brief on the Merits which hold that a jury can draw reasonable inferences from the proven facts and that a Court of Appeals cannot substitute its judgment for that of the jury.

Despite the fact that *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949) and *Southern R. Co. v. Puckett*, 244 U.S. 571 (1916) are cases of railroad employees who were injured by stepping on clinkers, the respondent does not even discuss them but instead searches the record for facts favorable to it and strenuously argues them.

The Court of Appeals and respondent both argue that "plaintiff still would not be entitled to recovery unless it (the jury) was allowed also to speculate that it is negligence *per se* to allow such an object (the clinker) to become mixed in with the fine ballast used in improving its roadbed." (R. 144)

In *Corpus Juris Secundum*, Vol. 65, Par. 1 "e", (Negligence) page 323, it is stated that:

"This distinction between negligence *per se* and negligence not *per se* respects merely the method by which the existence of negligence is to be ascertained, in particular instances. When once its existence is determined, whether through the court's judicial cognizance or the jury's finding as a matter of fact, there is no further distinction made; and the one form of negligence has, in the further consideration of the case, just the same effect as the other, no more, no less. When the standard of conduct of a reasonable man is expressly defined by legislative enactment or judicial decision, the failure to conform to that standard is called negligence *per se*."

It was not necessary for the jury to "speculate" that the respondent was guilty of negligence *per se*. The jury could reasonably have found from the record that the respondent did not furnish petitioner a safe place to work. Respondent's own witness testified that a fist size clinker imbedded in a roadbed near a switch made for an unsafe place to work. (R. 87)

Somewhat similar to the case at bar is *Thompson v. Gibson*, 290 S.W. 2d 305 (Ct. Civ. App. Tex., 1956). There the employee was injured when he stepped on a stone which rolled in loose gravel in a railroad yard which had been constructed about six months before the accident in question. He testified that he did not see the "rock" before or after he fell.

The Court of Appeals in affirming the trial court's judgment for plaintiff says at page 309:

"We are of the opinion that it was for the jury to determine whether defendant's failure to provide him with a reasonably safe facility whereby the distance from the round house to the engine might be traversed, or to make reasonably safe the premises necessary to be traversed in reaching the engine, was negligence and a proximate cause of his injuries, particularly in view of the fact that assumption of risk is not a defense to suits for damages in this kind of case." (citations).

IV.

The issue of negligence was for the jury, not for the Court of Appeals, to determine.

The constitutional right to a trial by jury in Federal Employers' Liability Act cases has been diligently and vigilantly defended by this Court.

If the decision of the Court of Appeals is permitted to stand, it will be used as authority for the proposition

that a negligence case which has been established by circumstantial evidence in a jury trial can be reviewed by a Court of Appeals as an appellate jury.

This would be so because a Court of Appeal, or a trial judge, who was reluctant to accept a jury's verdict, could always think of some "possibilities" of negligence of a third person or stranger and say that no probabilities could be deduced from the evidence which had been passed on by the jury and which decided the guilt of the defendant.

If there is probative evidence in the record from which fair-minded persons could draw reasonable inferences of the defendant's guilt a jury question is presented even though this evidence is not conclusive or overwhelming. There was such probative evidence in the case at bar.

This Court said in *Barry v. Edmunds*, 116 U. S. 550, 565 (1885):

"In no case is it permissible for the court to substitute itself for the jury and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award."

It is petitioner's firm and consistent belief that the Court of Appeals weighed the evidence and substituted its judgment for the verdict of the jury in violation of the directions of this Court.

As was said in Volume 29, *Marquette Law Review*, Page 78:

"Congress in the future may choose to pass a Federal Workmen's Compensation Act which will fill the gap, but in the meantime both Congress and the Supreme Court of the United States obviously intend that the Act shall be liberally construed and wherever

uncertainty as to the existence of negligence arises from the evidence, or where fair-minded men will honestly draw different conclusions as to the negligence from undisputed facts, the question is not one of law but one of fact to be settled by the jury."

CONCLUSION.

Petitioner respectfully submits that the judgment of the Court of Appeals for the Seventh Circuit should be reversed and that the judgment of the trial court on the verdict of the jury should be affirmed.

Respectfully submitted,—

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APR 6 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1955 ✓

No.  711 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955.

No. 714.

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. A) reversing the judgment in the instant case is reported in 228 F. 2d 257.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether or not in a suit brought under the Federal Employers' Liability Act, Title 45 U. S. C. Section 51 *et seq.*, the burden of proof remains upon the plaintiff to produce probative facts that the defendant knew, or in the exercise of reasonable care should have known, of the presence of an object, foreign to a roadbed, upon its premises.
2. Whether in the absence of such proof, as found by the Court of Appeals, it can properly reverse the verdict and judgment entered in the trial court against the defendant and direct that judgment be entered for the defendant.

STATEMENT OF THE CASE.**Additional Material Facts.**

At the time the plaintiff observed the grain leaking he was about 20 feet south of the house track switch. (R. 13.) He did not see the cinder or clinker that was, by his guess, about the size of his fist before he took the step although he had occasion to look at the ground. (R. 14.) He never noticed whether or not the clinker had been on top of the roadbed or imbedded before he made the step. (R. 15.) The parties stipulated (Def't. Ex. I; R. 45, 112) and the plaintiff testified that defendant's Exhibit I substantially represented the conditions as they existed at that locale. (R. 58.) He had never, prior to July 2, 1952, noticed large cinders around the house track switch. (R. 59-60.) On July 2 he noticed no other large cinders around the house track switch other than the one he stepped on. (R. 60-61.) He did not know when the cinder was placed there or who placed it there. (R. 62.)

The ballast used to repair the house track switch consisted of chat or cinders, the largest being about 2" in diameter. (R. 73.) The section foreman, Mr. Rector, inspected the track and switch for bad footing about twice a week. (R. 74.) No complaints of footing conditions were received by Mr. Rector following the repair work by employees of the defendant. (R. 75.) Defendant's track inspector, Mr. Oelrichs, passed over the house track switch once or twice or more a week. (R. 79.) His duty was to inspect the tracks, ties, roadbed and shoulder to correct any unsafe condition found. (R. 79.) He never received complaints about footing conditions around the house track switch. (R. 79-80.) Defendant's Supervisor of Track, Mr. Brosnahan, passed over the house track switch every three or four weeks. (R. 85.) On these trips he would inspect the ballast. (R. 85.) He had never received complaints

about the footing conditions at the house track switch at Mount Olive, Illinois. (R. 86.)

REASONS FOR DENYING THE WRIT.

1. **The Decision of the Court of Appeals Does Not Conflict With Any of the Decisions of This Court and Does Not Contravene the Seventh Amendment to the Constitution of the United States.**

Notwithstanding the decisions and excerpts therefrom set out on Pages 6, 7 and 8 of the petitioner's petition this Court has repeatedly made it crystal clear that under the Federal Employers' Liability Act, 45 U. S. C. Section 51, *et seq.*, the employer is not an insurer and the injured employee can only recover upon proof of negligence on the part of the employer which is the proximate cause of the injury to the employee. In *Wilkerson v. McCarthy*, 336 U. S. 53, 61; 69 S. Ct. 413-417, 93 L. Ed. 497, Mr. Justice Black said:

"Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries."

To the same effect see:

Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572.

Tennant v. Peoria & Pekin U. Ry. Co., 321 U. S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520.

Since negligence, then, is the basis of the employer's liability, under the Federal Employers' Liability Act, 45 U. S. C. Section 51, *et seq.*, and not the fact that injuries occur, the petitioner had, under common law negligence principles, the burden of proving by substantial evidence that the re-

spondent knew, or by the exercise of reasonable care should have known, of the presence of the cinder or clinker in question on its premises. Noting the absence of such proof in the record the Court of Appeals held, and properly so, that the decision of the trial court be reversed and that judgment be entered in favor of the respondent herein. As was said in the case of *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479, 480, 64 S. Ct. 232, 234, 88 L. Ed. 239:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co. v. Hughes*, *supra*; *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524. Cf. *Gunning v. Cooley*, 281 U. S. 90, 94; *Commissioners v. Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The petitioner in the instant case charged the defendant with negligence in failing to use ordinary care to furnish him with a reasonably safe place to work. To sustain his position he testified that he stepped on a cinder or clinker, on premises of the defendant, and sustained injuries. Omitted from "The Material Facts" set forth in his petition is his testimony, upon direct examination, that he never noticed whether the cinder or clinker was on top of or imbedded in the roadbed. (R. 15.) No evidence is in the record as to where the cinder came from, who placed it there or how long it had remained there. The petitioner admitted when his deposition was taken that he had never noticed large cinders in the area before (R. 59, 60), and,

without reference to the deposition, that on the day of the occurrence complained of saw only the one cinder. (R. 60, 61.) There is not even any testimony that the repair work done in the vicinity by employees of the defendant extended to the point where the petitioner fell. The Court of Appeals in its opinion (228 F. (2d) 257, at 259; Pet. App. 14) had to assume that the area involved was so affected. A finding of negligence on the part of this respondent under the meager facts presented would be purely conjectural and without the factual substance requisite for liability under the statute. From no evidence at all, except as to the presence of the clinker, the jury would have to infer that the repair work extended to the location in question, that defendant and not an outside agency negligently placed it there while making the repairs or otherwise, and that notwithstanding petitioner's direct testimony, the cinder was buried. As this Court stated in *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573, 578, 71 S. Ct. 428, 95 L. Ed. 547:

"This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway v. U. S.*, 319 U. S. 372, 395."

It is apparent that what the petitioner seeks is to escape the burden of proof that the law casts upon him to prove the negligence of the respondent. His position seems to be that once a speculative possibility of negligence is presented, nothing further is required to present a question for the jury. No decisions of this Court nor of any other court, where cases founded upon common law principles are adjudicated, have been found by respondent nor cited by petitioner that sustain such a contention. Bare possibilities are not sufficient; as this Court stated in *Tennant v. Peoria & Pekin U. Ry. Co.*, 321 U. S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520:

"In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove

that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked'." (Emphasis supplied.)

The burden was not upon the respondent herein to prove that it was not negligent; the burden was on the petitioner to prove that it was negligent. The Court of Appeals rightly held that the petitioner failed to meet his burden of proof.

The cases decided by this Court that the petitioner urges run counter to the decision of the Court of Appeals in the instant case have one important distinguishing feature. In each uncontroverted facts existed as to positive acts for which the defendants therein, their agents or employees were responsible from which the jury could find negligence.

In *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, the cause was remanded for a new trial and was again before this Court in 323 U. S. 574. In 318 U. S. at p. 57, it was stated "the night was dark and the yard was unlighted." In 323 U. S., it was held that the jury could find negligence from the operation of defendant's engine without a tail light as required by the rules of the Interstate Commerce Commission and a departure from the usual custom and practices in backing cars without giving adequate warning.

In *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, the defendant employer after having constructed an open trestle bridge 18 feet above the ground with little available footing and no guard rail, elected to place a hopper

car loaded with cinders on this bridge for unloading. With this obviously unsafe footing, Bailey was ordered to open a hopper with a heavy three foot wrench—work that could and should have been performed near the bridge on level ground.

In *Tennant v. Peoria & Pekin U. Ry. Co.*, 321 U. S. 29, employees of the defendant were violating a company rule that an engine bell must be rung when an engine is about to move.

In *Blair v. Baltimore & Ohio R. Co.*, 323 U. S. 600, there was a multitude of charges of negligence and specific proof of the refusal of the foreman upon request of the plaintiff to furnish competent help and equipment and express directions to proceed with insufficient help. There also, the warehouse floor provided by the defendant had an uneven place due to its having sunken in, an existing defect obvious to the defendant.

In *Lavender v. Kurn*, 327 U. S. 645, a mail hook on the carrier's mail car was allowed to swing freely, a condition created by and necessarily well known to the defendants.

In *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, the defendant carrier so maintained its right of way as to permit an insufficient clearance to exist between a building and a spur track over which it operated.

In *Myers v. Reading R. Co.*, 331 U. S. 477, a safety appliance in the nature of a defective hand brake on defendant's car that was stiff and sticking and that "kicked back" resulting in injuries to the plaintiff was challenged as to its efficiency.

In *Wilkerson v. McCarthy*, 336 U. S. 53, the employer knowingly failed to adequately enclose a pit, designedly created by it, and acquiesced in its employees crossing the same.

In *Stone v. N. Y. C. & St. L. R. Co.*, 334 U. S. 407, the evidence showed a safer and more efficient method of removal of railroad ties and an unusual straining effort on the part of plaintiff to remove a tie as the direct result of the railroad foreman's specific order.

Thus it is apparent that in each of these cases there was a reasonable basis in the record for concluding that there was negligence on the part of the defendant therein, its agents or employees; the basis in some of the cases consisting of a hazardous physical or working condition known to the defendant railroad company and actually created by it and in the other cases there being a violation of the specific safety or operating rule promulgated by the railroad company defendant itself or by a governmental body for the safety of its employees.

These cases have not determined as contended by petitioner, that a jury can infer from an absence, not the presence, of probative facts in the record, that the respondent, and not another agency, negligently allowed the cinder to be on its premises. Especially appropriate to this case would seem to be the language of Mr. Justice Brewer who, in speaking through this Court in the case of *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 663, said:

“ * * * And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, *when there is no satisfactory foundation in the testimony for that conclusion.* If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies

any departure from settled rules of proof resting upon all plaintiffs." (Emphasis supplied.)

2. The Decision Herein Does Not Conflict With the Decisions of This Court, Cited By Petitioner As Applicable.

The petitioner states (Pet. p. 8) that the only two decisions ever decided by this Court applicable to this case are *Brown v. Western Railway of Alabama*, 338 U. S. 294, and *Southern Railway Co. v. Puckett*, 244 U. S. 571. He contends that the decision of the Court of Appeals conflicts with those decisions. No reasons are given by petitioner to support this conclusion—probably for the very good reason that they are non-existent.

In the *Brown* case the allegations of the complaint charged the plaintiff with a failure to furnish a safe place to work in that, at page 297:

"(b) In leaving clinkers . . . and other debris along the side of track in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen, working therein and that petitioner would have to perform his duties with said yards in such condition."

The defendant's demurrer to the complaint necessarily admitted these allegations. Furthermore, this Court said in the *Brown* case, at page 297:

"These allegations, fairly construed, are much more than a charge that petitioner 'stepped on a large clinker lying alongside the track in the railroad yards.'"

In the *Puckett* case there were present near the track of the defendant three large clinkers about six inches or eight inches in diameter. The plaintiff in that case stumbled over these clinkers and struck two old crossties overgrown with grass on the roadway of the defendant

near the clinkers. (85 S. E. 809, 810.) The plaintiff testified that if it had not been for the crossties he would not have fallen. (85 S. E. 809, 811.) Here again we have not an isolated cinder but the presence of three clinkers, two old crossties and an overgrowth of grass. The overgrowth alone is a circumstance that charges the defendant with knowledge even though the record was silent as to actual knowledge.

Clearly the Court of Appeals was correct in dismissing these cases as "inapposite". (Opin., App. 16; Pet. 9.)

3. The Decision of the Court of Appeals Does Not Set Forth a Standard of Proof In Conflict With the Decisions of This Court or Its Own Prior Decision.

Petitioner (Pet. 9) contends that the decision of the Court of Appeals conflicts with its prior decision in the case of *Spotts v. Baltimore & Ohio Railroad Co.*, 102 F. (2) 160. This contention is without merit. In the *Spotts* decision, the plaintiff's own testimony that the brake worked inefficiently was sufficient evidence, if believed by the jury, to sustain a verdict in his favor. After such testimony was elicited the Court of Appeals merely held that when the defendant adduced evidence from which the efficiency of the handbrake could be inferred, the Court of Appeals would not attempt to resolve the conflict according to where they thought the probable truth lay. In the instant case it was the lack of evidence to sustain the allegations of negligence charged, not conflicting evidence, that caused the Court of Appeals to reverse the decision of the trial court. Further, negligence is not the criterion for recovery under the Federal Safety Appliance Act, 45 U. S. C. Section 11; the employer must respond in damages for the injury to its employee from an inefficient handbrake, whether that inefficiency arose through the

neglect of the employer or an outside agency, and regardless of how shortly before the accident the brake became "inefficient."

The respondent submits that the *Spotts* decision in no way runs counter to the decision of the Court of Appeals in this case. Instead, as the Court of Appeals pointed out in its opinion (228 F. (2d) 257, at 260; Pet. App. 16) the common law rule that it applied to the instant case was the same as the one the Court had previously applied in the case of *Kaminski v. Chicago River & Indiana Railroad Co.*, 200 F. (2d) 1.

Lastly, petitioner asserts the decision of the Court of Appeals conflicts with the decisions of this Court. *Myers v. Reading R. Co.*, 331 U. S. 477, 483, like the *Spotts* case involved the Safety Appliance Acts and is rightly consistent therewith. Adopting petitioner's statement (Pet. 8) that the only decisions ever decided by this Court involving railroad employees injured by clinkers on the railroad right-of-way are the *Brown* and *Puckett* cases, it is respectfully submitted for the reasons hereinabove set forth under Point 2, there is no conflict between the instant decision and the decisions of this Court.

Petitioner states (Pet. 10) that the opinion of the Court below, if permitted to stand, will result in prejudice to the substantial rights of petitioner and to other persons. This statement overlooks the fact that each case is decided on its own merits and that the courts are interested in seeing that justice is accorded to the defendants as well as to the plaintiffs.

CONCLUSION.

The opinion of the Court of Appeals is fully justified by the record and is consistent with the decisions of this Court. It is respectfully submitted that this petition for a writ of certiorari should be denied.

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OCT 4 1956

JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit.

RESPONDENT'S BRIEF ON THE MERITS

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Statement—Additional Material Facts	2
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SUMMARY OF ARGUMENT.

<p>In the case at bar, fundamentally a common law negligence action, with certain modifications of that law that Congress has seen fit to impose by the provisions of the Act, the petitioner had the burden of proving certain negligent acts or omissions on the part of the respondent. The Court of Appeals properly held that the petitioner, in order to make a submissible case, had the burden to adduce substantial evidence that the respondent either negligently placed the clinker or was chargeable with notice, either actual or constructive, of its presence. <i>Tennant v. Peoria & Pekin U. Ry. Co.</i>, 321 U.S. 29 (1944); <i>Brady v. Southern Ry. Co.</i>, 320 U.S. 476 (1943).</p>	4-6
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<p>There are no probative facts in the trial court record from which the negligence of the respondent could reasonably be inferred and the Court of Appeals held, and rightfully so, that the petitioner had failed to sustain his burden and that a verdict should have been directed for the defendant.</p>	9
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<p>Verdicts must rest on reasonable probabilities not merely one of several speculative possibilities not supported by substantial evidence in the record. <i>United States v. Crume</i>, 54 F. 2nd 556 (CCA 5—1931); <i>Henry H. Cross Co. v. Simmons</i>, 96 F. 2nd 482 (CCA 8—1938).</p>	13-14
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The Court of Appeals has the power to determine whether or not the record contains sufficient probative facts to make a submissible case for the jury, and where, as here, the record does not contain sufficient probative facts from which a jury might reasonably infer that the respondent was negligent the Court of Appeals did not invade the province of the jury and violate the scope of appellate review by setting aside the petitioner's verdict and judgment and directing entry of judgment for the respondent. *Eckenrode, Administrator, v. Pennsylvania R. Co.*, 335 U.S. 329.17-18

There is no evidence in the record from which a jury could reasonably conclude that the procedure followed by the respondent in improving its roadbed was not usual and customary, or that any other methods are used by any railroad in the construction of their roadbeds.18-19

This decision should not be set aside as it is not in conflict with any decision of this court. It does not weigh or evaluate evidence and usurp a jury function, but decides properly that where plaintiff fails to produce competent evidence to support the claim of negligence, that the case should not be submitted to the jury.14

ARGUMENT.

Point I

The opinion of the Court of Appeals does not stand for the proposition that petitioner must negate inferences of negligence of persons other than the respondent.4

Point II

The Court of Appeals did not invade the province of the jury by setting aside the petitioner's verdict and judgment and directing entry of judgment for the respondent. 15

Point III

It was incumbent on plaintiff to adduce evidence that the defendant knew or, in the exercise of reasonable care, should have known of the presence of the cinder. 18

Conclusion 21

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 42

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Petitioner,

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ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit.

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT ADDITIONAL MATERIAL FACTS

At the time the Petitioner observed the grain leaking, he was standing about 20 feet south of the house track switch (R. 13). He took one step and stepped on the cinder or clinker and fell. He did not see the cinder or clinker, that was by his guess about the size of his fist, before he took the step although he had occasion to look at the ground (R. 14). He never noticed whether the clinker was on top of the roadbed before he made this step. When he first saw the cinder after the accident it was out of the ground or partially out of the ground (R. 15). The parties stipulated (Deft's Ex. I; R. 45, 112) and the Petitioner testified that Defendant's Exhibit I substantially represented the conditions as they existed at that locale (R. 58).

Prior to the accident and practically every day the Petitioner had occasion to pass over the house track switch. He was familiar with the footing conditions around this switch (R. 58). The petitioner stated that the area in question was used by the firemen to clean fire boxes at Mount Olive, but that any clinkers he saw were out of his way (R. 59). He admitted that at the time of the taking of his deposition on November 4, 1954, he stated that he had never noticed large cinders near the house track switch on previous trips prior to July 2, 1952. On the day of the accident he noticed no other large cinders around the house track switch other than the one he stepped on. He did not know when the cinder was placed there or who placed it there (R. 62).

The ballast used to repair the house track switch consisted of chat or cinders, the largest being about 2" in diameter (R. 73). These repairs were made in the latter part of March, 1952, and no work was done in that area between that time and July 2, 1952 (R. 72). Respondent's Section Foreman Lester Rector inspected the house track switch semi-weekly for bad footing or objects that might be laying around (R. 74).

Oelrich, Respondent's Track Inspector, at times made a walking inspection of the roadbed along side of the house track switch (R. 81). Brasnahan, respondent's Track Supervisor, testified that on some, but not all, occasions he would stop at the house track switch to inspect the ballast (R. 85).

ARGUMENT

POINT I

THE OPINION OF THE COURT OF APPEALS DOES NOT STAND FOR THE PROPOSITION THAT PETITIONER MUST NEGATE INFERENCES OF NEGLIGENCE OF PERSONS OTHER THAN THE RESPONDENT.

In the heading of Point I of petitioner's argument, he contends that a plaintiff need not negate inferences of negligence of third persons in order to recover under the Federal Employers' Liability Act. The respondent has no quarrel with that proposition and, in fact, will concede the correctness of such a statement, so far as it goes. Undoubtedly the reason for such inclusion in the petitioner's argument is because of the petitioner's belief that the Court of Appeals in its decision in the instant case held that a plaintiff must negate such inferences.

The respondent cannot concede the correctness of this belief and instead contends that in reaching such a conclusion, the petitioner has misconstrued or misinterpreted the decision.

The reading of the opinion clearly discloses that in reaching this decision, the Court of Appeals applied well established and accepted principles of negligence law as they apply to cases arising under the Federal Employers' Liability Act.

In the case at bar, fundamentally a common law negligence action, with certain modifications of that law Congress has seen fit to impose by the provisions of the Act, the petitioner had the burden of proving certain negligent acts or omissions on the part of the respondent. The

Court of Appeals merely held that the petitioner, in order to make a submissible case, had the burden to adduce substantial evidence that the respondent either negligently placed the clinker or was chargeable with notice, either actual or constructive, of its presence.

This Court has recognized such a requirement in the case strongly relied upon by petitioner in Point I of his argument, *viz. Tennant v. Peoria & Pekin U. Ry. Co.*, 321 U.S. 29 (1944). This court, speaking through Mr. Justice Murphy, said at page 32:

"In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred."

In the absence, therefore, in the trial court record, of the requisite probative facts from which the negligence of the respondent could reasonably be inferred, the Court of Appeals held, and rightfully so, that the petitioner had failed to sustain his burden and that a verdict should have been directed for the defendant.

Again in Point I of the petitioner's argument (P. 10), the petitioner contends that the Court of Appeals in the instant case had no right to weigh evidence; that to do so would usurp the function of the jury. In the case of *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943) this Court said at pages 479-480:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co. v. Hughes*, *supra*; *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, 524, *Cf. Gunning v. Cooley*, 281 U.S. 90, 94; *Commissioners v. Clark*, 94 U.S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The decision of the Court of Appeals was not arrived at by searching the record for conflicting circumstantial evidence, with the court weighing such evidence and substituting its judgment for that of the jury; it was arrived at through the failure of petitioner to present sufficient probative facts from which the negligence of the respondent could reasonably be inferred, as required by *Tennant v. Peoria & Pekin U. Ry. Co.*, 321 U.S. 29 (1944).

To the extent that the petitioner argues, if such be the case, that the fact of injury alone plus the possibility of negligence on the part of the defendant, unsupported by probative facts in the record from which such negligence can reasonably be inferred, requires submission of the case to a jury, this respondent will categorically state that it has never found a case standing for such a proposition nor does the petitioner cite such a case in his brief.

In *Tennant v. Peoria & Pekin U. Ry. Co.*, 321 U.S. 29 (1944), the sufficiency of the evidence of negligence of the respondent therein was apparently not even before this

Court. The fact is, the opinion of this Court indicates that the lower court therein had found there was evidence of negligence by the carrier and this Court held at page 33:

"As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question."

Nor is such a result startling in view of the fact that there was evidence that a rule of the defendant required a train bell to be rung prior to an engine movement, but that the train crew failed to ring the engine bell prior to the movement that resulted in fatal injuries to Tennant. In the presence of such evidence this court held that notwithstanding contradictory evidence the question of whether this act or some other acts caused the injury should be determined by the jury.

In *Lavender v. Kurn*, 327 U.S. 645 (1945), this Court held that the record contained probative facts from which the jury could infer that the injuries were caused by a mail hook dangling from a train of one of the defendants therein; even the Supreme Court of Missouri admitted that such an inference could be drawn.

The respondent is unable to ascertain how the decisions of *Myers v. Reading R. Co.*, 331 U.S. 477 (1947) and *Spotts v. Baltimore & O. R. Co.*, 102 F.2d 160 (7th Cir.—1939), cited in Point I of the petitioner's argument, are in any way applicable to the instant case. Both of these cases were brought under the provisions of the Safety Appliance Acts, 45 U.S.C., Section 11. This court has held that in such cases the duty imposed on a carrier by the railroad engaged in Interstate commerce to provide "efficient" hand brakes is an absolute one. Negligence plays no part in the trial of such suits. Both cases establish the rule that the

testimony of the plaintiff alone that the brake failed to work efficiently was a fact sufficiently probative to support a jury verdict against the carrier.

In the remaining two cases discussed by the petitioner under Point I in his brief, namely, *Stancsek v. Pennsylvania R. Co.*, 174 F 2nd 43 (7th Cir.—1949) and *Hemwood v. Cöburn*, 165 F 2nd 418 (8th Cir.—1948), it was apparent that the evidence presented in the trial court contained sufficient probative facts from which an inference of negligence on the part of the defendants therein could reasonably be drawn by the jury.

In Point II of the petitioner's argument, he has cited a number of decisions by this Court, and other courts, construing the Federal Employers' Liability Act and suits brought thereunder. Most of these cases were submitted by the petitioner for the consideration of the Court of Appeals in either his brief and argument or his petition for re-hearing before that court. It was pointed out by the respondent at that time and it is strenuously urged here that in each of these cases there was presented sufficient probative facts from which the jury could reasonably infer negligence on the part of the carrier.

The most recent decision of this Court cited by the petitioner in Point II of his argument is that of *Schultz, Administrator v. Pennsylvania R. Co.*, 350 U.S. 523 (1956). The opinion of this Court indicates that in that case the district judge conceded there was some evidence of negligence on the part of the defendant and this Court concluded that from the facts presented, fair-minded men could find the defendant negligent in requiring the petitioner's intestate to work on dark, icy and undermanned boats of the respondent therein. Surely, in the absence of such probative facts pointing to the negligence of the defendant, it

would have been the court's duty to take the case from the jury and direct a verdict for the defendant in accordance with the mandate laid down by this court in *Brady v. Southern Ry. Co.*, 320 U.S. 426 (1943).

The court below, in the instant case, after a very careful and exhaustive review of the record in this case concluded in an unanimous opinion, that the petitioner had failed to sustain his burden; that the fact that a speculative possibility existed that this respondent, along with countless other agencies, might have been responsible for the presence of the clinker, did not satisfy the evidentiary requirements laid down by this court for submitting such a case to a jury; that a speculative possibility does not supply the place of proof.

Obviously this decision by the Court of Appeals does not hold that a plaintiff must negate all possible inferences of negligence of persons other than the defendant.

The decision of the Court of Appeals in the instant case is not unlike the decision of this Court in the case of *Gulf, Mobile & Northern R.R. Co. v. Wells*, 275 U.S. 455 (1928). In that case an employee brakeman charged the defendant carrier with negligence, through its engineer, in giving a sudden unnecessary jerk to the train while the employee was attempting to board it, causing him to be thrown to the ground. The plaintiff testified that as he grabbed the grab iron, he stepped on a big piece of coal—his foot turned and as he went down the engine gave an unusual jerk which threw him loose of the train. The engineer and other members of the crew testified for the defendant that the train was started in the ordinary way and that at the time of injury there was in fact no unusual jerk or lurch of the train.

From a verdict and judgment in favor of the plaintiff, affirmed by the Supreme Court of the State, a writ of certiorari was granted by this Court on petition of defendant. The plaintiff argued that the question of the engineer's negligence was properly a jury question because of an inference that could be drawn from the plaintiff's own statement that the engine gave an unusual jerk. In reversing the judgment, the Court charged that such an inference could not be drawn, as there was no evidence that the engineer knew or should have known that the plaintiff was in a position in which a jerk of the train would be dangerous to him; that plaintiff's opinion that the jerk was unusual and severe had no substantial weight, considering his physical situation by the side of the train at the time of the alleged jerk.

This Court said on page 372:

"In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom taken most strongly against the railway company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough." (Citing cases.)

In *Hawkins v. Clinchfield R. Co.*, 266 SW 2nd 840 (Ct. App. Tenn.—1953) suit was brought under the Federal Employers' Liability Act when the plaintiff, a yard brakeman, stepped off an engine onto a nail which penetrated his foot. The board which held the nail, being covered with grass and weeds, was concealed and invisible. The defendant was charged with negligence in failing to provide the employee with a safe place to work. In affirming a directed verdict for the defendant, the Court of Appeals said on page 841:

"According to the plaintiff's testimony he did not see the board which held the nail, and there was no evidence that it could have been seen by the defendant by the exercise of reasonable care. Nor was there evidence that the defendant had knowledge of its existence, or how long it had been there. Under these circumstances it could not have been reasonably foreseen by the defendant that the nail would cause injury to one of its employees." Therefore, in the absence of proof of actionable negligence on the part of the defendant, we think that the court properly granted a new trial and directed a verdict for the defendant.

"Furthermore, under the Act, the presumption prevails that the defendant was not aware of the existence of the nail, and, until it was shown that the defendant knew or by the exercise of ordinary care should have known of it, the defendant would not be charged with such knowledge." (Citing cases.)

In *Patton v. Texas & Pacific Ry. Co.*, 179 U.S. 658 (1900), the plaintiff, a railroad fireman, brought suit against his employer, alleging negligence in the failure to have an engine step securely fastened which resulted in his sustaining injuries as the step turned when he attempted to step off the engine.

In affirming a directed verdict for the defendant, this Court pointed out, after summarizing the testimony in the case, that it was impossible to tell how the step became loosened; that this may have occurred from the ordinary working of the engine or because the step struck something or because large lumps of coal may have dropped on the step.

Another possibility was that an employee of the defendant failed to properly fasten the step shortly before the accident.

This court concluded that on the record it was a mere matter of conjecture as to how the step became loose.

The following language is found on page 663-664:

" * * * The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & Pacific Railway v. Barrett*, 166 U.S. 617. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause; when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Petitioner on page 9 of his Brief on the Merits contends that the Court of Appeals erred when it used the following language:

" * * * There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation."

Webb v. Illinois Central Railroad Company, 228 F. 2nd 257 at page 259.

There have been numerous cases decided by both this Court and lower courts that stand for the proposition that verdicts must rest on reasonable probabilities, not speculative possibilities. This rule is applicable both as to the question of negligence and as to the question of causation.

See *United States v. Crume*, 54 F. 2nd 556 (CCA 5—1931) where the court said at page 558:

“Verdicts must rest on probabilities, not on bare possibilities. There is not capacity in any number of the former to create the latter. So the person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor. He cannot leave the right of the matter to rest in mere conjecture and expect to succeed. . . . The doctrine of those cases condemns the grounding of a verdict upon such shadowy proof as not to establish the vital facts to a reasonable certainty.’ *Samulski v. Menasha Paper Co.*, 147 Wis. 285, 133 N.W. 142, 145.”

Also, in the case of *Henry H. Cross Co. v. Simmons*, 96 F. 2nd 482 (CCA 8th—1938), the Court held that it was improper to submit to a jury a choice of possibilities, saying at page 486:

“To submit to a jury a choice of possibilities is but to permit the jury to conjecture or guess, and where the evidence presents no more than such choice it is not substantial, and where proven facts give equal support to each of two inconsistent inferences, neither of them can be said to be established by substantial evidence and judgment must go against the party upon whom rests the burden of sustaining one of the inferences as against the other. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819; *Liggett & Meyers Tobacco Co. v. De Parcq*, 8 Cir., 66 F. 2nd 678; *Eggen v. United States*, 8 Cir., 58 F. 2nd 616; *Fidelity & Deposit Co. v. Grand National Bank*, 8 Cir., 69 F. 2nd 177. The impossibility of proof

of material facts, while a misfortune, does not change rules of evidence, but leaves the one having the burden of proof with a claim that is unenforceable. *Burnet v. Houston*, 283 U.S. 223, 51 S. Ct. 413, 75 L. Ed. 991."

Verdicts must rest on probabilities, not on bare possibilities. *New York Life Ins. Co. v. Trimble*, 69 F. 2nd 849, 850 (CCA 5th—1934); *Love v. New York Life Ins. Co.*, 64 F. 2nd 829, 832 (CCA 5th—1933).

Other cases holding that before an issue can be submitted to a jury either as to negligence or as to causation, the facts presented must be in the area of reasonable "probability" rather than speculative possibility are the cases of: *A. T. & S. F. Ry. Co. v. Toops*, 281 U.S. 351 (1930); *McDermott v. Minneapolis, N. & S. Ry. Co.*, 283 N.W. 116 (Supr. Ct. Minn.—1938); *Fort Worth & Denver City Ry. Co. v. Smith*, 206 F. 2nd 667 (5th Cir. 1953); and *Devine v. Southern Pacific Company*, 295 P. 2nd 201 (Supr. Ct. Ore.—1956).

In the last cited case the Supreme Court of Oregon said at page 203:

"We have often stated that an issue of fact may be submitted to a jury only when the proof shows reasonable certainty as opposed to 'a finding dependent upon conjecture and speculation,' and that mere possibility, alone, of a causal relation between an injury and a physical result are insufficient to lift the case out of the area of conjecture and speculation. *Henderson v. Union P. R. R. Co.*, 189 Or. 145, 160, 219 P. 2d 170."

It is submitted that where, as here, the evidence produced by the plaintiff presented merely one of several speculative possibilities, not supported by substantial evidence in the record, the court below properly reversed the judgment for the plaintiff in the trial court and ordered a finding for the defendant. When such a situation exists the court does not usurp the functions of the jury.

POINT II.

THE COURT OF APPEALS DID NOT INVADE THE PROVINCE OF THE JURY BY SETTING ASIDE THE PETITIONER'S VERDICT AND JUDGMENT, AND DIRECTING ENTRY OF JUDGMENT FOR THE RESPONDENT.

Petitioner presents the following question to this Court for review in question II:

“Does a Court of Appeals invade the province of a jury and violate the scope of appellate review in a Federal Employers' Liability Act case by setting aside an employee's jury verdict and judgment and directing entry of final judgment for the railroad when the record shows that:

“The Employee stepped on a large clinker buried near a switch stand in a soft, new roadbed constructed by the railroad about three weeks before the accident; the railroad's firemen cleaned their fireboxes at this location; the employee's duties required him to work on the ground at this point and the employee and the employer's witnesses testified that a clinker as described made for bad footing and an unsafe place to work?”

It is assumed that the excerpts allegedly found in the trial record and contained in his question are what he contends constitute the facts sufficient to sustain his verdict in the trial court. It cannot be denied that any testimony as to footing conditions or the relative safeness of the place to work is wholly immaterial unless sufficient probative facts are presented from which the negligence of the employer in creating this condition can reasonably be inferred.

Respondent does not deny that petitioner's duties required him to work at the place in question, but again this fact is of no value whatsoever in determining whether or not the respondent was guilty of any negligent act or

omission. Likewise, giving every inference to petitioner's bald assertion, without elaboration, in the trial record that firemen cleaned their fire boxes at this location, any inferences of negligence of the respondent to be drawn from such a statement is completely nullified by petitioner's admission that on the day of the accident he noticed only the one clinker and that he had *never* noticed large cinders near the house track switch prior to July 2, 1952 (R. 60).

The remaining conclusion drawn by the petitioner from the trial record and set forth in his question II is that he stepped on a clinker buried near the switch stand in the new roadbed constructed by the respondent about three weeks before the accident. In proceeding on the theory that the cinder or clinker was buried, it is apparent that the petitioner placed greater weight on his unsworn statement than on his sworn testimony on the witness stand. Under oath, he testified he never noticed whether or not the clinker was on top of the roadbed before he made his step (R. 15); that when he started to turn he stepped on a cinder or clinker and fell (R. 14) and that when he first saw the object after his fall, it was out of the ground or partially so (R. 15).

The comments of the trial judge during cross-examination of the petitioner would likewise seem to refute plaintiff's present contention that the cinder or clinker was buried (R. 60-61).

The record in this case reveals no affirmative evidence as to how or when the clinker got onto the right of way at the point where the accident happened. There is no dispute that the cinder or clinker had never been seen prior to July 2, 1952 either by the petitioner, who was over the area in question practically every day, or by any of the

employees of the respondent charged with the responsibility of maintaining the site in question free from objects foreign to a roadbed. It can hardly be denied that it will never be known when and by what agency the cinder became placed in the position where the accident occurred.

Granted, a wholly speculative possibility exists, unsupported by probative evidence in the record, that the cinder in question had been on the premises of the respondent thru an act of the respondent or for a period of time sufficient to charge the respondent with constructive notice of its presence. Likewise, as forcibly pointed out by the Court of Appeals of the Seventh Circuit, there are countless other speculative possibilities also present, that the presence of the cinder was attributable to agencies over which this respondent had no control. No case found by this respondent has ever held that such a speculative possibility can substitute for the burden placed on the petitioner to introduce into evidence probative facts from which the negligence of the respondent can be inferred by a jury. To infer negligence on the part of the respondent upon the meager facts presented in the record could only be grounded upon speculation, pure and simple. As this court stated in *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573 at 578:

“Speculation cannot supply the place of proof. *Galloway v. U. S.*, 319 U.S. 372, 395.”

It is submitted that where there are no probative facts from which the negligence of the respondent can reasonably be inferred, the Court of Appeals does not invade the province of a jury and violate the scope of appellate review by setting aside the petitioner's verdict and judgment and directing entry of judgment for the respondent. This Court in the case of *Eckenrode, Adm. v. Pennsylvania R. Co.*, 335 U.S. 329 (1948), in affirming an order of the U. S.

Court of Appeals for the third circuit directing a judgment for the defendant said, page 330:

"There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence when viewed in a light most favorable to the petitioner, which can sustain a recovery for her."

This respondent respectfully says that there is no evidence in this record upon which the jury could have found negligence on the part of the respondent which contributed in whole, or in part, to the petitioner's injuries.

POINT III.

IT WAS INCUMBENT ON PLAINTIFF TO ADDUCE EVIDENCE THAT THE DEFENDANT KNEW OR, IN THE EXERCISE OF REASONABLE CARE, SHOULD HAVE KNOWN OF THE PRESENCE OF THE CINDER.

Point III of petitioner's Brief on the Merits raises the question as to whether or not plaintiff was obligated to prove notice of a defective condition created by respondent in its own roadbed.

As clearly pointed out by the Court of Appeals, the presence of the object referred to by plaintiff is not negligence *per se*. There was no evidence from which a jury could reasonably conclude that the procedure followed in improving its roadbed was not usual and customary, or that any other methods are used by any railroad in the construction of their roadbed. The extracts from the record quoted by petitioner in his brief (pp. 23-24), far from proving negligence, on the contrary only goes to show the extreme watchfulness and care exercised by respondent. The record fails to sustain petitioner's burden to adduce probative facts that the defendant "carelessly"

allowed a cinder six inches in circumference to be placed in its roadbed. The mere presence of a single cinder, if it was imbedded in the roadbed, does not give rise to a reasonable inference that its presence was the result of "negligent" conduct on the part of the defendant.

We must conclude that the cinder was present. It was one of obviously hundreds of thousands of cinders. To state that it is reasonable to conclude that it was allowed to be placed in the roadbed as a result of negligence is creating the obligation of insurer on the part of the defendant, which is contrary to the decisions of this court. (*Wilkerson v. McCarthy*, 336 U.S. 53). The rank speculation required to reach a conclusion of negligence should not be condoned.

Petitioner did not attempt to prove that the defendant's usual and customary manner in creating and repairing roadbeds exhibited a lack of care on its part. He obviously did not attempt to introduce evidence that in following its normal procedures if it had exercised care it would have known of the presence of this cinder. Petitioner's entire case is based on the mere fact that the cinder was present on the property of the defendant. Petitioner cites the case of *Sears, Roebuck & Co. v. Peterson*, 76 F. 2d 243, 246 (8 Cir. 1935). The reading of this case clearly indicates that the evidence affirmatively showed that the defendant established a standard of care in its procedure for removing twine from trees and then deviated from its standard in allowing a piece of twine to be present in the aisle where the plaintiff tripped on it. It violated its custom and practice. The fact that the defendant did not introduce any witness to contradict the circumstantial evidence introduced prompted the court to state that they must assume, in the absence of an explanation, that their testimony would not have contradicted the plaintiff's that

this twine was removed by their employees and thrown into the aisle where it was found at the time of the accident. This case clearly points out the necessity for proof of more than an alleged defect, that is, probative evidence that the defect was the result of failure to exercise reasonable care. Moreover, as stated in that case, page 245, the lower part of the aisle towards the floor was dark because the stands or counters obstructed the light, a fact with which the defendant was charged with notice and which of itself constitutes actionable negligence.

In the instant case the Court of Appeals in restating this fundamental principle of negligence law did not hold that negligence requires knowledge on the part of the defendant, but that in the absence of proof of actual knowledge, evidence must be presented upon which a jury can determine that the procedure utilized was careless or that there was a negligent failure to comply with its established method of procedure.

As the Court of Appeals stated in the instant case:

"Furthermore, were we to hold that it was proper to permit the jury so to speculate, plaintiff still would not be entitled to recovery unless it was allowed also to speculate that it is negligence *per se* to allow such an object to become mixed in with the fine ballast used in improving its roadbed. Defendant's duty to plaintiff in this respect was to exercise the care of a reasonably prudent person, under the existing circumstances, to prohibit the introduction of a hazard into the roadbed where plaintiff was required to work. Cf. *Seaboard Air Line Ry. Co. v. Horton*, 233 U.S. 492; *Missouri Pacific R. Co. v. Zolliecoffer*, 191 S.W. 2d 587, 588 (Ark.). Not only is there no evidence that defendant violated that duty, but also, there is a total want of evidence as to what constitutes reasonable prudence under the proved circumstances."

Petitioner cannot reasonably contend that the Court of Appeals held that knowledge must be proven on the part of the defendant before it is liable for the actions of its agents or servants. He begs the question presented which was that while bound by the acts of ones agents to establish liability, there must be evidence that such acts are "negligent".

CONCLUSION

Respondent respectfully submits that the opinion of the Court of Appeals is fully justified by the record and is consistent with the decisions of this court; that this court should affirm the judgment of the Court of Appeals; or in the event that the judgment be reversed, that said cause be remanded to the Court of Appeals for consideration of the other assignments of error not heretofore considered by the Court of Appeals.

Respectfully submitted,

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MOTION FILED MAR 22 1957
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 42

JOHN W. WEBB,

v.

Petitioner,

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED BY
THIS COURT ON THE MERITS ON FEBRUARY 25, 1957

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF RESPONDENT'S PETI-
TION FOR REHEARING**

AND

**BRIEF OF THE ASSOCIATION OF AMERICAN RAIL-
ROADS AS AMICUS CURIAE IN SUPPORT OF SAID
PETITION FOR REHEARING, TO BE CONSIDERED
IN CASE SAID MOTION FOR LEAVE TO FILE BE
GRANTED.**

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Motion for leave to file brief *amicus curiae* in support of respondent's petition for rehearing
 Brief of The Association of American Railroads as *amicus curiae* in support of said petition for rehearing

1

I. INTEREST OF *AMICUS CURIAE*

1

II. ARGUMENT

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Point I. Case No. 46, *Herdman v. Pennsylvania Railroad Co.*, decided on the same day as this case, read alone, seems to apply the correct rules of the substantive law of negligence applicable to cases of this character under the FELA, but it fails to distinguish itself from this case, No. 42, and from two other cognate cases, Nos. 23 and 59, decided the same day, and the said four cases, grouped together for purposes of dissent in the four cases and of concurrence in No. 46 and dissent in Nos. 28, 42 and 59, and the result of their divergent opinions leaving the controlling law in a state of unfortunate confusion

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Point II. The opinion of this Court in the instant case, No. 42, however, not only does not clarify the law, it further confuses it. It should be modified to bring it into harmony with fundamental principles of the law of negligence and causation

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Point III. This Court's decision on the same day in No. 28, *James C. Rogers v. Missouri Pacific Railroad Co.* will be read together with its decision in this case, No. 42, and, so read, it tells the bench, the bar and the pub-

lie that juries must be allowed to base verdicts in these FELA cases on speculation and conjecture. The opinions in this case and in No. 28 should be revised so as to eliminate that holding

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Point IV. We submit that the course of this Court's FELA decisions since *Brady v. Southern Railway Co.*, 320 U. S. 475 (1943) has undermined all the "smallest part" of the law of negligence left in the statute by Congress and that that course should be checked now, at this Term, so as at least to leave in life the principles (1) that jury verdicts in these cases may not be supported upon a mere scintilla of evidence, and (2) that juries may not be allowed to base verdicts for plaintiffs in these case on pure speculation and conjecture, either as to railroad negligence or as to causal relation between such negligence and the injury to or death of an employee

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III. CONCLUSION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 42

JOHN W. WEBB,

Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED BY
THIS COURT ON THE MERITS ON FEBRUARY 25, 1957

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF RESPONDENT'S PETI-
TION FOR REHEARING.**

The Association of American Railroads (AAR) hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of respondent's petition for rehearing. The consent of counsel for the respondent has been obtained. The consent of counsel for the petitioner has been requested but refused. Hence this petition is filed under Rule 42 (2) and (3). Since our time and respondent's time run concurrently, expiring on Friday, March 22,

1957, four days after our employment in this matter, this motion and the subjoined brief have had to be prepared without our having had the benefit of seeing respondent's Petition for Rehearing, which we are informed it intends to file.

The movant, The Association of American Railroads, hereafter, referred to as "AAR," is a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada and Mexico. Full membership is open to all Class I railroads as now classified by the Interstate Commerce Commission, that is, all having gross annual operating revenues of three million dollars or more, and there is provision for associate membership by railroads and terminal and switching companies having less than that amount of gross annual operating revenues, all of which latter are now classified as Class II railroads.

There are at present 187 full members and 164 associate members of AAR. The Class I member railroads operate over 99 per cent. of the total railroad mileage of Class I railroads in the United States and have gross operating revenues of over 99 per cent. of the total Class I operating revenues in this country. The activities of AAR cover a wide range having to do with such matters as research, operations, car service, traffic, safety, public relations, accounting, statistics, law and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

AAR, as the joint representative and agent of these member and associate member railroads, has a vital interest in the developments of the law of the Federal Employers' Liability Act, 45 U.S.C. 51-60 (1952 ed.)—hereinafter called "FELA"—and in the changing interpretations of that substantive law in the decisions of this Court in the last sixteen

years. That interest is different from, and broader than, the interest of a particular member railroad in a particular case it may have before this Court under the Act, since the particular litigant is immersed in the facts in evidence, pleadings, and particular contentions, arguments and holdings of courts below in its particular case, often to the exclusion, to some extent, of a broad view of the developments of the general and fundamental principles of the substantive law under the Act.

AAR is informed, believes and, therefore, alleges that respondent in this case will make timely filing of a petition for rehearing in which it will pray this Court to reconsider the facts in evidence herein as well as to reconsider and modify its opinion and judgment herein of February 25, 1957. AAR, if this motion for leave to file brief *amicus curiae* in support of respondent's said petition for rehearing be granted, does not intend to ask or urge this Court to give a still further reappraisal of the facts in evidence herein, or of particularities of pleadings, motions, contentions, or other technical matters. We shall confine our presentation to consideration of the Court's opinion and judgment herein and to pointing out important respects in which it is not in harmony with other pertinent decisions of this Court and serves to leave the substantive law of the FELA, not in a state of greater clarity and certainty, but in a state of even greater confusion, than heretofore, so that state trial and appellate courts and federal district and circuit judges, and the bar of this country, will have more difficulty than ever before in educing from this Court's decisions a coherent pattern of controlling principles of the law of negligence as applicable in cases arising under the FELA. In speaking of such cases, we mean, of course, cases such as this one, involving simple, common-law concepts of negligence and causation, unaffected by any allegations of violation by the railroad-defendant of any of the safety appli-

ance statutes of Congress, violation of which imposes upon the violator an absolute legal liability for damages, regardless of fault. These reasons lead us to believe that important questions of law which we intend to present, and which we shall submit are highly relevant to final disposition of this case, will not be so adequately presented by the parties as we may present them if this motion be granted.

AAR further has a vital interest in the ever-larger amounts of operating revenues which its members have to disburse annually in satisfaction of claims and suits under the FELA, amounts totalling many millions of dollars annually, amounts which have more than doubled and trebled in the past fifteen or sixteen years, in large part by reason of the changing principles applied by this Court in the course of its decisions under the FELA. For example, the most recently available statistics show that for the period April 1, 1955, to December 31, 1955, its Class I member railroads paid out for employee injuries and fatalities alone, not including payments to passengers, cross-accident claimants, trespassers or other non-employees, in suits under the FELA \$22,164,140, and in settlements of claims under that Act \$4,114,441, or a total of \$26,278,441. For the full year 1956, the same members paid out in such suits \$28,328,285 and in settlement of such claims \$4,626,378 or a total of \$32,954,663.

The grand totals for the same Class I member railroads for the full period of four years and four months, from September 1, 1952 through December 31, 1956, were as follows:

Number of suits	7,106	
Amounts of settlements of suits		\$ 99,470,153
Claims settled	2,908	
Amount of claims settlements		\$ 24,420,944
Aggregate payments		\$123,891,097

No such statistics were kept prior to September 1, 1952 and AAR had no department keeping such statistics prior to that date. It should be observed that no claims settled directly with claimants who did not have lawyers are included, and there were a great many of these of which we have no records.

And it must be remembered that the public ultimately must bear such enormous burdens on operating revenues and that they are at much higher rates for the public-servant railroads than for privately operated profit industries which are, by and large, covered by Workmen's Compensation Acts, which impose liability without fault but, in compensation for granting to injured employees and imposing upon employers such substantive, automatic liability, strictly limit recoveries to carefully established amounts graduated according to the nature of the injury.

Wherefore, your movant respectfully prays that this motion be granted and presents and files its separate brief *amicus curiae*, bound in the same pamphlet with this motion, upon which it will rely if the present motion be granted. This we understand to be the proper practice under revised Rule 42, see Stern and Gressman, *Supreme Court Practice—Second Edition—Revised Rules*, pp. 316-317.

Respectfully submitted,

SIDNEY S. ALDERMAN,
Counsel for the movant, The
Association of American Railroads.

Of Counsel:

FRANCIS M. SHEA,
SHEA, GREENMAN, GARDNER & MCCONNAUGHEY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 42

JOHN W. WEBB,

Petitioner,

v.s.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED BY
THIS COURT ON THE MERITS ON FEBRUARY 25, 1957

**BRIEF OF THE ASSOCIATION OF AMERICAN RAIL-
ROADS AS AMICUS CURIAE IN SUPPORT OF RE-
SPONDENT'S PETITION FOR REHEARING.**

I

INTEREST OF AMICUS CURIAE

A concise statement of the interest of The Association of American Railroads—hereinafter called "AAR"—is set out in the preceding motion for leave to file this brief, as required by Rule 42(3). Instead of repeating that state-

ment here, we believe it to be the better practice to, and we do, refer to that statement and ask that it be considered as incorporated here by reference and as proper compliance with Rule 42 (5) requiring that a brief *amicus curiae* "set forth the interest of the *amicus curiae*, . . ."

We do not undertake to make a Statement of the Case but fully adopt the statement to be made by respondent in its petition for rehearing. There is no question of jurisdiction. This Court has taken jurisdiction and exercised it on the merits. We do not deem it to be proper for a "friend of the Court" to undertake to tell this Court about the details of a case with which the Court was already thoroughly familiar long before this "friend" became acquainted with the case at all.

We do here merely point out, as already suggested in the foregoing motion, that this case involves no allegation or contention that the respondent railroad violated any federal, statutory safety appliance requirement, a violation of which would impose upon the violator an absolute liability as a matter of law for damages to any employee injured as a result of such violation. We have in this case, therefore, only the simple and familiar common-law concepts of negligence and causation on the question of liability *vel non* and the customary questions as to the respective functions of juries, trial courts and appellate courts in such uncomplicated cases under the FELA. But we do have conflict between this Court's opinion and judgment in this case and its well-considered opinions and judgments in other comparable and recent cases, as we shall undertake to demonstrate.

II

ARGUMENT

POINT I

Case No. 46, *Herdman v. Pennsylvania Railroad Co.*, decided on the same day as this case, read alone, seems to apply the correct rules of the substantive law of negligence applicable to cases of this character under the FELA, but it fails to distinguish itself from this case, No. 42, and from two other cognate cases, Nos. 28 and 59, decided the same day, and the said four cases, grouped together for purposes of dissent in the four cases and of concurrence in No. 46 and dissent in Nos. 28, 42 and 59, and the result of their divergent opinions, leave the controlling law in a state of unfortunate confusion.

We do not see how the Court could have reached any other result than that which it reached in No. 46, *Herdman*. Railroads are required to have their locomotives equipped with efficient air-brakes making possible emergency applications of brakes. Pennsylvania's freight locomotive engineer made such an emergency application in a dire emergency, to prevent striking an automobile, containing innocent people, including school children, with an inevitably resulting sudden stop, which threw down and injured the conductor in the caboose at the end of the train. Pennsylvania was fortunate in having as its employee-conductor and plaintiff in the suit against it a man of extraordinary frankness and candor as a witness in his own behalf. He testified as to the above facts and as to his fall and injury. He did not testify, as a plaintiff often would do, that the stop was made with any special or unusual severity. He did not claim that such unscheduled and sudden stops of trains are unusual or extraordinary

occurrences. He was honest enough to testify: "We got to expect them or think about them." The Court of Appeals for the Sixth Circuit agreed with the District Court that there was a complete absence of probative facts to support a conclusion of railroad negligence. This Court granted certiorari to determine whether the petitioner was erroneously deprived of a jury determination of his case. It held that he was not so erroneously deprived and affirmed the judgment of the Court of Appeals. Mr. Justice Frankfurter dissented from the granting of certiorari. Mr. Justice Harlan concurred in this Court's decision.

If we can read that opinion and decision rightly, it contains implicitly and gives effect to the following fundamental principles, which we think should be declared explicitly and reaffirmed in clear terms, substantially as they were declared in *Brady v. Southern Railway*, 320 U.S. 476 (1943):

1. The FELA does not impose upon railroads liability without fault;
2. It does not make railroads insurers of the safety of their employees;
3. It does not impose upon them liability based merely upon the fact of injury to an employee while within the scope of his employment;
4. It is still a negligence statute and the burden is upon the plaintiff to adduce evidence of probative facts sufficient to support a reasonable conclusion of railroad negligence from which the injury or death resulted "in whole or in part," in the absence of which proof it is the duty of the trial court to take the case from the jury, either by directed verdict for the defendant, or by judgment for defendant *n.o.v.*, or by setting aside the verdict if it has been rendered, and it is likewise the duty of the appellate court to reverse the trial court if it fails to do so.

As Mr. Justice Harlan well said in his opinion concurring in No. 46 and dissenting in Nos. 28, 42 and 59, "No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573. And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts." (The italics for emphasis are Mr. Justice Harlan's).

That the Seventh Amendment did not lift that duty from the courts is the clear teaching of the opinion of Mr. Justice Rutledge for this Court in *Galloway v. United States*, 319 U.S. 372 (1943). At page 395 of its opinion in that case, this Court dealt with "standards of proof" our courts have traditionally required for submission of evidence to the jury. It said that the matter is not greatly aided by substituting one formula for another and concluded, in words highly relevant to the present case:

" * * * Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. * * * "

The whole paragraph ended with the statement, "If there is abuse in this respect, the obvious remedy is by correc-

tion on appellate review." And those quotations are from a lengthy and carefully reasoned opinion in which this Court had before it, throughout, the question as to the effect and application, if any, of the Seventh Amendment on this very matter of courts taking cases from juries.

Since the Seventh Amendment, the act of the sovereign people, did not, as Mr. Justice Harlan says, and as this Court held in *Galloway*, lift that duty from the courts, it seems plain that the FEIA *a fortiori* did not and could not have such effect.

It further seems plain that that is the necessary effect of this Court's decision in No. 46, *Herdman*, decided the same day as the present case.

POINT II

The opinion of this Court in the instant case, No. 42, not only does not clarify the law, it further confuses it. It does worse than that. It tells the bench, the bar, and the public that juries must be allowed to base verdicts in these FEIA cases on speculation and conjecture. The opinion should be revised so as to eliminate that holding.

We had hoped that this Court's decision in *Lavender v. Kurn*, 327 U.S. 645 (1946), in which a majority of this Court as then constituted expressly authorized juries in these FEIA cases to base verdicts for plaintiffs on pure speculation and conjecture, had been tacitly allowed quietly and gracefully to repose in the limbo of unfortunate decisions which had best be forgotten. Recovery of verdict for damages in that case itself was affirmed on the basis of purely speculative and conjectural evidence. Mr. Justice Murphy, who wrote the opinion for this Court himself expressly indulged in pure speculation and conjecture in his opinion.

For a full analysis of that case, see Alderman, *What the New Supreme Court Has Done to the Old Law of Neg-*

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ligence, 18 Law & Contemp. Prob. 110-159, at 133-138. Since Mr. Justice Frankfurter, in his dissent in Nos. 28, 42, 46 and 59, cites his own book, perhaps the author of this brief may be forgiven for citing his own law review article, in spite of its perhaps irreverent, but certainly not irrelevant, title. It was one of only two articles written from the railroad employer viewpoint in that most complete symposium on the FELA ever published. The other paper therein written from the railroad viewpoint, was Gibson, *The Venue Clause and Transportation of Lawsuits*, *ibid.*, pp. 367-431.

The *Lavender* case produced an extraordinary reaction among the lower federal courts, which have the primary responsibility for the administration of FELA. See the comments by Circuit Judge Major in *Griswold v. Gardner*, 155 F. 2d 333-334 (7th Ct. 1946), decided less than two months after this Court decided *Lavender*.

We had hoped that *Lavender* had been stored in a chest with "old lace." But in this Court's opinion in this case, in footnote 6, *Lavender* is brought forth and revived and juries are again expressly authorized to base verdicts for plaintiffs on speculation and conjecture. It is rather unusual for this Court to make such a far-reaching holding and re-affirmance in a footnote. Footnotes are helpful devices when properly employed, but we submit that they are not the proper medium for holdings which revolutionize long-settled and fundamental principles of law. We earnestly urge the Court to modify the opinions both in this case and in No. 28, which are inseparable and contemporaneous declarations on the same narrow body of law, and eliminate the authorization to juries to base verdicts for plaintiffs in these cases on mere speculation and conjecture. Unless that is done, the FELA becomes in deed and truth a statute favoring railroad employees with the advantages of the compensation principle of damages without fault of

the employer and based on the fact of injury alone, but not granting to the paying-employers the corresponding right not to have to face juries—with the “sky the limit” or, at least, the vicarious generosity of trial judges the only limit, on the amount of awards. This violates the whole philosophy of workmen’s compensation acts.

POINT III

The opinion of this Court in the instant case, No. 42, is further confused by the confusions to be found in this Court’s opinion in No. 28, *Rogers v. Missouri Pacific Railroad*, which will certainly be read together with the opinion in this case handed down on the same day. The opinions in both cases should be modified to bring them into harmony with fundamental principles of the law of negligence and causation.

We respectfully submit that this Court’s opinion in No. 28, which will be generally read in conjunction with its opinion in this case, No. 42, adds confusion to that found in the opinion in this case itself and that both of said opinions are in conflict with this Court’s opinion on the same day in No. 46, *Herdman v. Pennsylvania Railroad Co.*

The opinions in Nos. 28, 42, and 59 led Mr. Justice Harlan to say in his dissent, “However, in judging these cases, the Court appears to me to have departed from these long-established standards, for, as I read these opinions, the implication seems to be that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts. I cannot agree with such a standard, for I consider it a departure from a wise rule of law, not justified either by the provision of the FELA making employers liable for injuries resulting in whole or in

part' from their negligence, or by anything else in the Act or its history, which evince no purpose to depart in these respects from common-law rules."

Thus Mr. Justice Harlan puts our criticisms of the Court's opinions in this case, No. 42, and in Nos. 28 and 59, much more effectively than we could have put them ourselves.

It is to be noted that Mr. Justice Reed dissented in this case and in Nos. 28 and 59 and that Mr. Justice Burton did not concur in the language of the opinions in the three cases, limiting his concurrence to the result. Mr. Justice Reed has now retired and his successor has been nominated and confirmed. The personnel of the Court is again undergoing a change. It would seem to be quite appropriate for the Court to grant a rehearing in this case and to reconsider and modify its opinion herein, which has evoked such criticism from members of the Court.

In the opinion in No. 28, after stating the facts and disapproving one ground upon which the Supreme Court of Missouri had based its opinion and judgment in that case, this Court apparently undertook to make a careful clarification of the law of negligence as it should be applied in cases of this character under the FELA. But, with greatest respect, we submit that it used language which not only did not clarify but, on the contrary, succeeded in more thoroughly confusing the state of this particular branch of federal law than has ever been done before. This Court there said:

"The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court [below] that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case

there was no case for the jury. But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. * * *

That may be exposition in accordance with the old school rhetoric principle of beginning exposition by first stating "what a thing is not." But not only is the whole negative approach here confusing, also the expository second sentence of that quotation is so shot through with negatives piled upon negatives, (negative in "there is no jury question," negative in "although," negative in "unless the judge can say that the jury may exclude" [that is, find a negative], negative in "causes with which the defendant was not connected," negative in "unless his proofs are so strong," negative in "that the jury * * * may exclude a conclusion,") that the reader cannot escape the feeling that the author of the expository passage has actually double-negatived himself into stating the very opposite of what he intended. We could get no meaning whatsoever out of the passage until we had re-read it half a dozen times, and then only a glimmer of meaning. According to our count there are six distinct negatives in the one sentence, which equals three double negatives, or three affirmatives, which we feel sure the author did not intend. Rather we assume that he intended

to fortify an ultimate negative assertion in the sentence by multiplying negatives for intensification. However that may be, we feel certain that the bench and bar of the nation will have great trouble parsing out the meaning of that expository statement.

We are not helped much in our understanding of the Court's meaning in that case when it completed "saying what a thing is not" and took up the affirmative approach. Thus it was said, "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." That statement takes a simple, statutory positive, "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," and exalts it into a judicial superlative, "even in the slightest." This inevitably suggests that the Court is changing the settled federal rule that a mere scintilla of evidence will not support a jury verdict,¹ and substituting the old so-called "scintilla rule" which some state courts used to apply to FELA cases until this Court's decisions put a stop to the practice.

That last quoted passage from the opinion in No. 28 is further confused by the citation to it, in footnote 11, of *Coray v. Southern Pacific Co.*, 335 U. S. 520, which was not this kind of case at all but was a case involving alleged violation of a safety appliance act of Congress, a violation of which would impose absolute liability on the violator. No question of negligence of the carrier was involved in that case. It does not improve clarification to cite it here.

Later in the affirmative statement this Court slightly

¹ *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524 (1925); *Western & Atlantic R. Co. v. Hughes*, 278 U. S. 496, 498 (1929); *Brady v. Southern Railway Co.*, 320 U. S. 476, 479 (1943).

misquoted from the FELA the words "in whole or in part to its [the statutory words are "from the"] negligence" and underscored the words "in part" for emphasis. Then the Court again put its superlative gloss on the statutory positive, saying:

"The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. [Citing as "a comprehensive survey of the history of the FELA," Griffith, *The Vindication of a National Public Policy under the Federal Employers' Act*, 18 Law & Contemp. Prob. 160.] The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses, and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. [Citing *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54.] The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, [citing *The Robert Edwards*, 6 Wheat. 187, 190] from which the jury may with reason make that inference."

Obviously this Court could not have intended that last sentence as it actually reads. The obligation of the employer to pay damages does not arise when there is proof, even though entirely circumstantial, from which the jury "may" with reason make that inference. Such obligation arises only if and when the jury, on such reasonable evidence, actually draws that inference and incorporates it

into a verdict for plaintiff. There may be other, conflicting evidence, from which the jury may with equal reason draw a contrary inference. The whole passage just above quoted sounds startlingly as if this Court conceives that any jury, whenever allowed by the trial judge to do so, will inevitably draw the necessary inference to support award of damages in favor of the plaintiff employee and against the defendant employer. That may be true. But it surprises us that this Court should use language suggesting that it is true.

In view of the extent to which Congress has "stripped" defendants in these cases of all common-law defenses, and in view of the fact that there is no legal defense left except the one that the plaintiff has not met his burden of proof, has not adduced sufficient evidence to support a reasonable inference and finding that injury or death resulted "in whole or in part" from the negligence of the defendant, it would seem that this Court ought not to be astute to allow juries to base verdicts for damages on evidence sufficient only to support a mere speculation or conjecture that the defendant was negligent and that the injury or death resulted "in whole or in part" from such negligence.

There was, of course, much metaphysical formalism in the development of the common-law principle of "proximate causation," in the talk about "*causa causans*," "sole, active, efficient, proximate cause," and other like expressions. Unquestionably Congress, by writing the words "in whole or in part" into this statute, made very substantial modifications in the common-law doctrine of proximate causation. One can hardly confine causation to what is "proximate" in the common-law sense when the statute imposes liability for negligence from which the casualty resulted "in whole or in part." But that does not mean that the whole doctrine of "causation" itself is abolished. Negligence from which the casualty did not result in whole or in

part cannot be the basis of liability. Evidence upon which a jury cannot reasonably base an inference or finding that carrier negligence caused a casualty at least "in part" cannot lawfully be made the basis of a jury award of damages under the FELA. And evidence sufficient only to enable a jury to speculate or conjecture as to carrier negligence and as to its causal relation to the casualty, even if only in part, or as this Court said in No. 28, even if only "in the slightest" part, ought not to be allowed to support a verdict awarding damages.

The course of decisions of this Court in these cases, particularly since the 1939 amendment of the FELA became effective, has brought forth strong and sincere protests from distinguished members of this Court. In the case of *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350 (1943), so constantly relied on by plaintiffs in these cases, and here, especially relied on by petitioner Webb, the late Mr. Justice Roberts was impelled to say, at p. 358:

"Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws; but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence."

On a broader plane, the late Mr. Justice Jackson said in his separate opinion, concurring in the result, in *Brown v. Allen*, 344 U. S. 443 (1953), at p. 535:

"Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

Again, in the same opinion, he said, at p. 540:

"* * * There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."

Finally, in the same opinion, Mr. Justice Jackson said, speaking from his heart, at p. 546:

"* * * But I know of no way that we can have equal justice under law except we have some law. * * *"

POINT IV

We submit that the course of this Court's FELA decisions since *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943), has undermined all the "smallest part" of the law of negligence left in the statute by Congress and that that course should be checked now, at this Term, so as at least to leave in life the principles (1) that jury verdicts in these cases may not be supported upon a mere scintilla of evidence, and (2) that juries may not be allowed to base verdicts for plaintiffs in these cases on pure speculation and conjecture, either as to railroad negligence or as to causal relation between such negligence and the injury to or death of an employee.

Under this head we shall be as concise as humanly possible. We again cite the above-cited article in 18 Law and Contemp. Prob. 110-159, which contains a comprehensive review and analysis of every FELA decision by this Court from *Brady v. Southern Railway Co.*, 320 U. S. 476 (1943), to and including *Stone v. New York, C. & St. L. R. R.*, 344 U. S. 407 (1953). We also attach as an appendix to this brief a short summary of the decisions by this Court in FELA cases since *Stone v. New York, C. & St. L. R. R.*, 344 U. S. 407 (1953), the last decision analyzed in that article

III

CONCLUSION

Our conclusion is a restatement of our Point IV, *supra*, which we request the Court to consider here as if repeated verbatim.

We further respectfully submit that the decision of this Court in this case is in conflict with the decisions by this Court in the following cases:

Braay v. Southern Railway Co., 320 U.S. 476 (1943);
Eckenrode v. Pennsylvania R.R. Co., 335 U.S. 329
(1948);

Reynolds v. Atlantic Coast Line R.R. Co., 336 U.S. 207
(1949);

Moore v. Chesapeake & O. Ry. Co., 340 U.S. 573 (1951).

Respectfully submitted,

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APPENDIX

Cases under FELA decided by this Court since
Stone v. New York C. & St. L. R. Co., 344 U.S. 407 (1953).

1953 TERM

No Cases

1954 TERM

Smalls v. Atlantic Coast Line R.R. Co., 348 U.S. 946 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justices Reed, Burton & Minton dissented. The facts are taken from the opinion of the Court of Appeals, 216 F. 2d 842 (C.A. 4, 1954).

The plaintiffs were standing at a railroad crossing waiting to be picked up by one of the railroad's trains for transportation to a safety meeting sponsored by the railroad. Attendance at the meeting was voluntary, but encouraged. While waiting for the train, plaintiffs were struck by an automobile driven by a person having no connection with the defendant railroad. The plaintiffs contended that the railroad had not provided them with a safe place to work in that the crossing was not lighted. A judgment for plaintiffs on a jury verdict was reversed by the Court of Appeals, on the ground that there was no evidence that the defendant was negligent. The plaintiffs were neither invited nor ordered to stand at the crossing, and a station, apparently lighted, was only some 200 yards away.

O'Neill v. Baltimore & Ohio R. Co., 348 U.S. 956 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. There were no dissents. The facts are taken from the opinion of the Court of Appeals, 211 F.2d 190 (C.A. 6, 1954).

The plaintiff, a boilermaker, was installing a heavy steel ash pan with the assistance of another employee. While the pan was being lifted into position, a new bolt broke causing the pan to fall on plaintiff who was standing below guiding the pan into position. The bolt had been selected by plaintiff from defendant's stores and had been used to attach a chain to the pan for lifting purposes. The type of bolt and method of lifting had been used many times before. No evidence was introduced as to what caused the bolt to break. The case was submitted to the jury on the theory of *res ipsa loquitur*, and the trial court entered a judgment on the jury verdict for plaintiff. The Court of Appeals reversed, one judge dissenting, holding that the inference of negligence arising under the *res ipsa* doctrine was rebutted by the evidence that the bolt was new and that defendant had purchased it from a manufacturer without any knowledge of a defect. A new trial was ordered. The Supreme Court ordered the judgment of the trial court reinstated.

1955 TERM

Neese v. Southern Ry. Co., 350 U.S. 77 (1955).

The Supreme Court reversed the decision of the Court of Appeals below in a short *per curiam* opinion. There were no dissents. The facts are taken from the opinion of the Court of Appeals, 216 F.2d 772 (C.A. 4, 1954).

The employee had been killed by what the jury found and the lower courts affirmed to be defendant's negligence. The jury returned a verdict of \$60,000 in damages, and the trial judge ordered the verdict set aside unless a remittitur of \$10,000 was made. This was done and a judgment for \$50,000 in damages entered. The employee was 22 at the time he was killed, and was survived by his father, 60, and his mother, 47. At the most, about a quarter of his salary—which averaged \$2,200 over a three-year period—had been contributed to his parents. His mother testified that she expected the deceased to have contributed about \$2500 a year to his parents after four or five years. The Court of Appeals held that this testimony was too im-

probable to be given credence in view of the contributions of the deceased in the past and his expected future salary allowing for expected increases. Even with the benefit of all doubts, damages of more than \$39,000 could not properly be awarded. A new trial on the issue of damages was awarded. The Supreme Court granted certiorari to consider whether the Court of Appeals had jurisdiction to review the action of the District Court. Without reaching the jurisdictional question, and to avoid a constitutional question, the Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court, since "the action of the trial court was not without support in the record." No indication was given in the opinion as to the nature of that support.

Schulz v. Pennsylvania R. Co., 350 U. S. 523 (1956).

This was a Jones Act case. An employee of the railroad was drowned while working as a tug fireman. Four of defendant's tugboats were docked side by side. Three of the boats were unlighted and dark, and the fourth was only partially illuminated by a spotlight on the pier. The temperature was below freezing and there was some ice on the boats. The deceased had been assigned to work on all four boats because the defendant did not have enough workers on hand properly to perform the duties assigned the deceased. There was no witness to the drowning. When the body was recovered, it was only partially clothed and a flashlight was clutched in one of its hands. When last seen, the deceased had been going to a cabin on one of the boats to change his clothes and the clothes he had been wearing were found in the cabin. A jury verdict for the plaintiff was set aside by the trial judge on the ground that there was no evidence to show that defendant's negligence was the proximate cause of the accident. The Court of Appeals affirmed, but the Supreme Court reversed and reinstated the verdict. The Court held that although there was evidence supporting inferences to the contrary, the evidence was also sufficient to support an inference that the plaintiff slipped on the ice and fell overboard while groping around in the dark with the aid of only a flashlight and

that it is the duty of the jury to choose between conflicting inferences, which it may do even if it has to rely on speculation. Justices Reed, Burton, and Minton dissented, and Justice Frankfurter would have dismissed the writ of certiorari as improvidently granted.

Anderson v. Atlantic Coast Line R. Co., 350 U. S. 807 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justices Reed, Frankfurter, Burton, and Harlan dissented on the ground that certiorari should not have been granted. The facts are taken from the opinion of the Court of Appeals, 221 F. 2d 548 (C.A. 5, 1955).

A conductor was killed while directing a switching operation. A refrigerator car was being moved by attaching it to an engine with a 14 foot chain and "jerking" it. This was a usual practice. While attempting to detach the chain, which he approached from the wrong side, the deceased was caught in it and crushed to death when the car continued rolling. The only eyewitness was the engineer, who testified that he could not have handled the engine so as to avoid the accident. The principal claim of negligence apparently was grounded on the failure of the engineer to warn the conductor of his danger by blowing the engine's whistle. A judgment on a jury verdict for the plaintiff was reversed by the Court of Appeals, which held that the engineer had no duty to blow the whistle and warn the deceased. The deceased was in charge of the operation, was an experienced employee, and seemed to be performing a usual function in a usual manner. The Supreme Court reinstated the judgment entered by the trial court.

Strickland v. Seaboard Air Line R. Co., 350 U. S. 893 (1955).

The Supreme Court in a *per curiam* opinion reversed a decision of the Supreme Court of Florida, citing *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350. There were no dissents. The facts are taken from the opinion of the Florida Supreme Court, 80 So.2d 914 (1955).

The plaintiff was changing an outside brake beam, weigh-

ing 118 pounds, on a pullman car, with the assistance of three others. This was being done over a flat roadbed, where the car had broken down. The roadbed was filled with sand and gravel, as usual. It was necessary for the plaintiff to work in a stooped or squatting position, and the work was done at night with the aid of a flashlight and a carbide light. This was the usual lighting, but an electric light on a drop cord was available. The plaintiff had requested the use of the electric light, but it was not furnished until after the accident. The plaintiff slipped and fell against a switch box. He testified that he did not know what caused him to slip. A track over a pit was nearby and available. This would have enabled the plaintiff to stand and to have the assistance of another for the inside work, and was safer than working over the flat track. The customary practice of the defendant railroad was to do the work over the flat track, although other railroads used a pit when convenient. A judgment for plaintiff on a jury verdict was reversed by the Florida Supreme Court. It held that the defendant had not negligently failed to supply plaintiff with a safe place to work, as alleged. While using the track over the pit was safer, there was no evidence that using the track over a flat road bed was not safe also and defendant was not required to change its usual practice when not unsafe in itself. The Supreme Court ordered the judgment in the trial court reinstated.

Cahill v. New York, New Haven & Hartford R. Co., 350 U. S. 899 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justice Reed dissented, and Justices Frankfurter, Burton, Harlan, and Reed would have denied certiorari. The facts are taken from the opinion of the Court of Appeals, 224 F. 2d 637 (C.A. 2, 1955).

The plaintiff was a brakeman assigned to flag eastbound motor traffic at a junction. He had never done such work before, and was warned to be careful. While doing this work, the plaintiff turned his back on the traffic to look around at a car on a train stalled at the junction. At that

moment, a stopped truck started up and struck plaintiff before he could get out of the way. The Court of Appeals reversed a judgment on a jury verdict for plaintiff. With regard to plaintiff's contention that the defendant was negligent in not providing him with a safe place to work, the Court of Appeals held that according to the evidence the plaintiff had been stationed at the safest spot, although it admittedly and necessarily involved some danger. The Court of Appeals also held that the defendant was not negligent in failing properly to instruct the plaintiff, since no conceivable instructions could have guarded the plaintiff against the negligence of the truck driver. A dissenting judge contended that the defendant was negligent in failing to instruct the plaintiff, new at the particular job, not to turn his back on the motor traffic. If the plaintiff had been facing the traffic, he would have seen the truck start up in time to jump out of the way.

The Supreme Court ordered the judgment of the trial court reinstated. Its mandate was subsequently modified to remand the case to the Court of Appeals for consideration of a matter not previously passed upon. This dealt with the admissibility of evidence of prior accidents at the junction. 351 U. S. 183 (1956).

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

Petition for Rehearing

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Now comes Illinois Central Railroad Company, Respondent, and presents herewith its petition for rehearing of this cause and respectfully prays that a rehearing be granted upon the grounds and for the reasons hereinafter set forth.

I.

Initially, respondent wishes to call to the Court's attention the undeniable fact that within the last decade the respondent has been confronted with an increasing reluctance on the part of both trial and appellate judges, and in both the state and federal courts, to withhold *any* case

that is brought under the Federal Employers' Liability Act from a jury determination, either as to negligence or as to causation. A motion for a directed verdict in a suit under this statute has received little attention from trial judges because of what is represented as the position of this Court. But, we have also noticed that such motions received careful consideration by the judiciary in other types of negligence cases.

We have read the opinions of learned appellate judges who have questioned whether or not this Court is committing the judiciary to the philosophy that this once recognized negligence statute should be considered a law that awards compensation for injuries without regard to fault. *Griswold v. Gardner*, 155 F. 2d 333. We are familiar with this Court's comment upon such an observation. *Wilkinson v. McCarthy*, 336 U.S. 53. In the latter case, Justice Frankfurter, in a concurring opinion, has pointed out that the trial judge must determine whether there is solid evidence presented that will support a jury's verdict; that a timid judge who simply leaves all cases to the jury's determination has failed in his duty as a judge. But it appears that many become timid as a course of least resistance to the views of this Court.

We feel that this Court's decision in the instant case, if allowed to stand, departing as it does from sound decisions concerning the quantum of proof that must be present before a negligence case can be submitted for a jury's determination, will result in making a mockery of a defendant's heretofore undisputed right to have peremptory motions passed upon after calm and careful deliberation by the trial court.

We do not mean to imply that we will be faced with timid judges in every case, but we do sincerely believe, due to the present announcements of this Court, that all judges

will be inclined to treat cavalierly the defendants' motions on questions of negligence and causation in suits under this statute.

We emphasize that if the opinion is allowed to stand in the instant case, although respect in passing is paid to rules of negligence law, the Court will make by judicial fiat a railroad the insurer of the safety of its employees. Congress certainly never intended that the judiciary should abrogate its constitutional duty and obligation to protect defendants from legally unfounded claims. *Brady v. Southern R. Co.*, 320 U.S. 476. The decision in the instant case and others announced on the same day open the treasures of every railroad because they undeniably hold that any statement by a plaintiff, no matter how unfounded or lacking in probative force, makes a submissible case for the jury. Perjury will be more rampant than ever because, no matter how strong the proof to the contrary, by way of impeachment or evidence indicating the improbability of any statement, this will only be a question for jury determination. The historical division of functions between judge and jury is brushed aside and the judge as a part of the court becomes a mere figurehead. Inferences may be drawn from either proved or unproved possibilities and the jury allowed to speculate at random.

The word "negligence" is not defined in the Federal Employers' Liability Act and there is no tenable basis in law or logic to construe that term in this statute as having some special or esoteric content or as anything else than a statutory absorption of the common law concept. The fact that Congress has not converted it to a compensation statute does not give the Court the right to legislate the act into a compensation act by judicial circumlocution. There is nothing in the act which indicates that it should be treated any different than any common law negligence

action, except for the removal of certain defenses. The quantum or quality of proof, the requirement of proof by the greater weight of the evidence on the part of the plaintiff, and what type of case is proper to submit to the jury are questions that should be determined under general negligence principles.

It is obvious there remains no defense for defendants if a plaintiff is going to be sustained by this Court with evidence that is without scintilla of value. Here the plaintiff stated he stepped on a cinder and fell. He was looking in the direction in which he was walking but did not see the cinder prior to his fall. After he fell he looked at the ground and observed an object of the size described. The condition of the roadbed was a bit soft so in walking one would leave a footprint. (R. 14-15) No other member of the crew was shown the cinder. Plaintiff stated he threw it away. (R. 62) There was no evidence that a cinder of the size described can be said to be a "large clinker." It was not an object large enough to create a reasonable anticipation it would cause one to trip over. Established substantive rules applicable to common law negligence in this type of claim teach (a) the respondent is not an insurer but chargeable only with the duty of exercising reasonable care to keep the place where work is performed reasonably safe for the workmen, *Ellis v. Union Pacific R. Co.*, 329 U.S. 649; (b) mere existence of the cinder and the happening of an accident did not infer fault or negligence, *Delaware L. & W. R. Co. v. Koske*, 279 U.S. 7; *Patton v. Texas & P. Ry. Co.*, 179 U.S. 658. The burden of proof is on plaintiff. *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, 575, 576. From a substantive law standpoint the plaintiff utterly failed in his proof. We suggest that the distinction between the petitioner's case and the settled

rules of the common law is worthy of the Court's reconsideration in its philosophy of what constitutes proof of negligence under the Act to this type of case.

II.

The Court misapplied controlling principles of law as enounced by its former decisions in Federal Employers' Liability Act cases.

The Court's opinion approaches negligence problems from an unusual aspect. It has disregarded its former decisions in which it stated that before a submissible case is made there must be *more* than a scintilla of evidence, but evidence sufficient to enable reasonable persons to infer both negligence and causation by reasoning from the evidence. *Moore v. Chesapeake & O.R.Co.*, 340 U.S. 573; *Brady v. Southern Ry. Co.*, 320 U.S. 476; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54; *Tennant v. Peoria & Pekin U. Ry. Co.*, 321 U.S. 29.

This Court in the cases decided with the instant case, viz.: the *Rogers* (No. 28) and *Ferguson* (No. 59) cases, holds that if the negligence of the employer played any part, even in the "slightest," or, where the negligence played any part, however "small," a submissible question is presented which, in effect, reduces to the irreducible the quantum of proof or the quality of proof which heretofore had been required. The fact that the Federal Employer's Liability Act is a comparative negligence statute and that contributory negligence is not a bar to recovery is not, and never has been, held to reduce the plaintiff's burden of proving by a preponderance of evidence the employer's negligence.

Likewise, in the *Rogers* decision, a portion of which is set out in the opinion in the instant case, this Court concludes that a negligence action brought under the provisions of the Federal Employers' Liability Act differs significantly in certain respects from an ordinary common law negligence action. If by that statement it is meant that the significant differences are the abolishment of the doctrine of assumption of risk and the substitution of comparative negligence, then we would agree. However, it is submitted that neither this act nor the previous decisions of this Court contain any other language that suggests modification of principles applicable to other negligence cases. By this we mean questions relating to the burden of proof that plaintiff must meet, the preponderance of evidence, and the quantum or quality of proof that must be presented before such a case can be submitted to a jury's determination. This Court has consistently held that, subject only to the express qualifications that Congress has written into this negligence statute, the cause of action must be tried under common law concepts of negligence and injury. *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350; *Urie v. Thompson*, 337 U.S. 163; *Stone v. New York C. & St.L.R. Co.*, 344 U.S. 407.

III.

The Court's finding that there were probative facts in evidence to justify with reason an inference of negligence is not supported by the record.

This Court has predicated liability of the respondent on the presence of a cinder about the size of petitioner's fist as a hazardous condition in respondent's roadbed. The basic assumption by the Court for this conclusion was that plaintiff slipped on a cinder "about the size of (his) fist" imbedded in the roadbed. This statement of the petitioner,

which is quoted in the opinion, is not complete. The record at page 14 reads as follows: "About the size of my fist, I guess." Petitioner on cross-examination, when questioned closely as to the size of the cinder in question, admitted his pretrial statement that it was approximately six inches in circumference. He further stated he knew what circumference meant and indicated it to the jury. (R. 63-64)

There was no issue that cinders two inches in diameter created a hazard in a railroad roadbed. The testimony of the section foreman is that cinders two inches in *diameter* would be about the largest used. (R. 73) It is common knowledge that two inches in *diameter* approximates six inches in circumference, the latter being petitioner's own estimate of the size of the cinder.

Respondent never conceded that the cinder in question, as described by petitioner, constituted a hazard in its roadbed or that it was as large as a man's fist. Indeed, it would be ludicrous for a railroad with 6,500 miles of right of way to concede that a single cinder, six inches in circumference, in a passing track, constitutes a hazard. It is common knowledge that railroading is not performed in a ballroom or parlor. That is true of coal mining, farming, oil drilling, road building, construction jobs and hundreds of other occupations. The opinion is not at all realistic in its viewpoint. All of the facts upon which the Court relies to predicate an inference of negligence in placing the cinder in question in the roadbed, or the failure to find such a cinder by a reasonable inspection, relate to and are dependent upon the basic assumption that the cinder in question was the size of a man's fist. In the absence of proof of this basic fact, the Court's conclusion of liability must fail.

The Court, assuming it was a hazard, states that there was ample evidence for a jury to determine that the procedure should satisfy the standard to be expected from a prudent man in light of the hazard to be prevented. The Court states that the ballast was not screened, but merely visually inspected. There was no evidence that any railroad or any employer doing similar work, including respondent, screened ballast. The Court stated that, since repair work was done, the jury might find that the cinder in question was in the ballast used and that, since it had been there for three weeks, the roadbed inspection was not proper. The evidence of care exercised by the respondent, which was uncontradicted, the Court says can be ignored and, in fact, can give rise to inferences of negligence. The Court cannot, with reason, find that the jury might disbelieve respondent's affirmative testimony and thereby create affirmative proof. As the Court stated in *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, at page 576:

"True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt v. Sierra Butte Gold Mng. Co.*, 138 U.S. 438, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it."

The Court says that it is questionable whether there was any burden on the plaintiff to show any other standard procedure. By this the Court intimates that a lay jury can prescribe proper railroad maintenance procedures without any evidence in the record as to other procedures available, or no matter how restrictive they might be in the normal operation of a business.

In analyzing the record objectively, one cannot lose sight of the fact that this accident was caused by the

presence of a *single* cinder. The practical effect of the Court's decision is that a jury, "without evidence" other than the fact that an accident occurred, is authorized to speculate far beyond the record and, without control by the courts, as to some way or procedure that would have prevented the accident from occurring. This destroys the fundamental concepts of negligence as understood by the judiciary generally and persons vitally affected by negligence law.

The majority opinion states that a measure of speculation and conjecture is required in choosing what seems to be the most reasonable inference. This is a matter of semantics. One of the definitions in Webster's Dictionary is as follows:

"Speculate—To theorize from conjectures without sufficient evidence."

This is wholly incompatible with the opinion's stated requirement that probative facts must be presented from which a jury can reasonably conclude that the test of negligence has been met. As this Court has previously held in *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 578:

"This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v. U.S., 319 U.S. 372, 395."

IV.

The Court's arbitrary finding that the questions not passed upon by the Court of Appeals are unsubstantial deprives the respondent of due process of law.

The Court summarily disposes of questions which were not considered in the briefs and oral argument in this Court. In the Court of Appeals the respondent assigned, briefed and argued substantial questions including the giving of a number of erroneous and highly prejudicial in-

structions. These were among the assignments which the Court of Appeals, because of its conclusion as to the insufficiency of evidence to sustain the verdict, found "unnecessary to consider other assignments of error." Specifically, but without limitation thereto, one of the assignments raised the impropriety of giving instructions concerning "assumption of the risk." It is indeed noteworthy that one of the justices of this Court, who did not even participate in the decision on the merits herein, specifically stated in the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1942 L.c. 72):

" 'Assumption of risk' as a defense where there is negligence has been written out of the Act. But 'assumption of risk,' in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. *Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded.*" (Emphasis added)

It is earnestly urged that the action of this Court in summarily disposing of these questions without permitting the Court of Appeals to pass on the merits of same and without affording the respondent an opportunity to present and argue the assignments in this Court deprives the respondent of due process of law. We respectfully submit that orderly process of judicial administration would more properly be served by the direction of this Court to the Court of Appeals, in any remanding order, to consider and rule upon the assignments not heretofore considered, as was done in *Senko v. LaCrosse Dredging Corporation*, No. 62, opinion in which was also announced February 25, 1957. Respondent respectfully contends that the giving of said instruction on assumption of risk and of other in-

structions assigned as error in the Court of Appeals were highly prejudicial and more logically account for the jury's verdict than the proof which this Court holds furnished ample support for inferences of negligence. It may be that the summary disposition of these assignments indicates a tacit approval of these instructions which this Court does not fully intend.

CONCLUSION.

The opinion of the Court in this and other Federal Employers' Liability cases decided the same day, if permitted to stand, eliminating as they do the element of reasonable foreseeability in negligence actions, deprive respondent and other interstate carriers of any standard of conduct to prevent being mulcted in damages.

For the foregoing reasons, respondent prays that this petition for rehearing be granted.

Respectfully submitted,

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Of Counsel

STATE OF ILLINOIS }
COUNTY OF COOK } ss

Joseph H. Wright, one of the counsel for respondent, being first duly sworn, deposes and says that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

JOSEPH H. WRIGHT

Subscribed and sworn to before
me this 20th day of March, 1957.

MARY L. O'CONNOR
Notary Public